89-1875 (1)

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Petitioners,

VS.

DALE CONNER and LINDA CONNER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KINKLE, RODIGER & SPRIGGS
A. J. PYKA
837 North Ross Street
Post Office Box 1558
Santa Ana, California 92702
(714) 835-9011
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

QUESTIONS PRESENTED

1. Is a warrant necessary to abate a declared public nuisance in a citizen's back yard after two years of notice, Pre-abatement Administrative Hearings and Appeals Procedures?

2. Should police officers who abate a declared public nuisance in a back yard, without a warrant, have qualified immunity when no state or local law required a warrant, no specific case law required the warrant, and where two Federal Judges concluded that a warrant was not required?

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Defendant, **CITY OF SANTA ANA, et al.**, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 1, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 897 F.2d 1487 (9th

Circuit 1990) and is printed in Appendix A hereto, infra, page A3. The judgment of the United States Court of Appeals of the Ninth Circuit is printed in Appendix A hereto, infra, page A3.

The opinion of the United States District Court, Central District of California, is printed in Appendix B hereto, infra, page B11.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page A3) was entered on March 1, 1990. The jurisdiction of the Supreme Court is invoked under 28 USCS Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On July 1, 1983 petitioners City of Santa Ana and its officials notified respondents Dale and Linda Conner of the City's intention to abate and remove five old and inoperable "junk" vehicles stored in the Conners' back yard. The Conners thereafter asked for and received a hearing from the police department. The Police Depart-

ment Hearing Officer found that the automobiles constituted a public nuisance and that they should be abated. The Conners appealed this determination to the Santa Ana City Council. The City Council appointed a Hearing Officer to receive evidence and statements and to file a recommendation. The Hearing Officer upheld the reasonableness of the police actions but recommended a 30 day extension of time in which the Conners could prove the automobiles were operable. On February 19, 1985, the City Council adopted the Hearing Officer's recommendation, except that it rejected the recommended 30 day extension of time. However, no attempt was made to abate the subject vehicles until June 7, 1985 and in the interim, the Conners failed to voluntarily abate the vehicles.

On June 7, 1985 City Officials, without warrant, entered the back yard of the Conner property and removed two of the vehicles from the property. The removal of the two vehicles required the taking down of a fence surrounding the back yard of the Conner property.

The Conners brought suit under 42 *U.S.C.* section 1983 contending, among other things, that the warrantless entry to remove the vehicles constituted an unlawful search and seizure and invaded their privacy.

On August 12, 1987 the District Court granted the petitioners' motion for summary judgment as to the entry and seizure of June 7, 1985 stating that:

> "when the public officials entered the plaintiffs' back yard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure."

In addition, the District Court determined that the individual defendants were entitled to qualified immunity

from liability for the entry and seizure of June 7, 1985. Plaintiffs, respondents herein, appealed both decisions.

On March 1, 1990 the United States Court of Appeals for the Ninth Circuit, in a case of first impression, found that regardless of how reasonable the warrantless entry and seizure appeared in light of the extensive pre-seizure process, the entry and seizure of June 7, 1985 nevertheless violated the Fourth Amendment. The Court of Appeals also reversed the District Court's granting of qualified immunity to all individual defendants stating that it was difficult to understand how the law requiring a warrant was anything less than clear.

REASONS FOR GRANTING THE WRIT

A. A Reasonable Seizure of a Declared Public Nuisance Should Not be Held Unconstitutional Merely Because of the Lack of a Warrant.

The Court of Appeals ignored the standard of reasonableness when it determined the constitutionality of the entry into the Conners back yard to seize the abandoned vehicles.

The Fourth Amendment prohibits only "unreasonable searches and seizures." However, the Court of Appeals specifically stated that the entry and seizure herein violated the Fourth Amendment "... regardless of how reasonable the warrantless search and seizure appeared in light of the pre-seizure process afforded the Conners." As stated by dissenting Circuit Judge Trott, this reasoning completely ignores the text of the Fourth Amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are "reasonable".

The majority opinion focused solely on the singular issue of whether or not the police had a warrant without considering the question of whether or not the values to be protected by the Fourth Amendment have been disturbed. The court's fixation on whether or not a warrant existed provides an easy answer but ignores the purpose of the Fourth Amendment and contains no analysis of the reasonableness of the entry and seizure.

The entry and seizure did not violate the Conners' reasonable expectation of privacy. The Conners had notice in July of 1983 of the City's intention to abate the vehicles. The Conners contested the need and propriety for abatement through adversarial Pre-abatement Hearings. The Conners appealed the rulings unsuccessfully and thereafter chose not to seek review in the California Superior Court. Thereafter, the Conners had the opportunity to voluntarily abate the declared nuisance but elected not to do so. It was only then that the entry and seizure was made and it cannot be said that this entry and seizure was unexpected or that any reasonable privacy interests remained.

The Fourth Amendment not only protects ones reasonable expectation of privacy but also prohibits arbitrary invasions by governmental officials. *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). The entry and seizure herein was not arbitrary. The extensive Pre-abatement Procedures not only gave the Conners actual notice of the City's intentions but also an ample opportunity to fully contest the propriety of the proposed abatement before a detached and impartial hearing officer. Indeed, the majority opinion does not even suggest that the entry and seizure was arbitrary. Rather, the majority opinion expresses concern over the fact that the entry and seizure of

the Conners' property occurred without any formal judicial authorization.

The mere absence of judicial authorization (a warrant) does not make the entry and seizure unconstitutional per se and certainly does not make it unreasonable. That the Pre-abatement Hearings constituted an adequate buffer between the Municipal Police Officers and the Conners cannot be more adequately stated than by dissenting Judge Trott:

> "There is nothing in the record to suggest that the City Council-which is part of the Legislative, not Executive, branch of government was anything but competent, impartial, neutral and detached. The hearings before the City Council most assuredly constituted an adequate buffer between the Municipal Police Officers and the Conners. For all practical purposes, the conclusion that a nuisance existed in violation of Municipal Law, and was therefore subject to abatement pursuant to the governmental power of the municipality, was judicial determined."

In addition, the "judicial authorization" sought by the majority, that is, a warrant, would have provided no more protection of the Conners' Fourth Amendment Rights than the extensive Pre-abatement process. The Conners took advantage of their right to contest the need and propriety of the proposed abatement in an adversarial hearing process whereas an application for a search warrant is ex parte.

In summary, and as stated by dissenting Judge Trott, the majority's opinion elevates form over substance by failing to consider the reasonableness of the entry and seizure or whether it violated the purpose or the values to be protected by the Fourth Amendment.

B. Requiring A Judicial Authorization Of An Abatement Determination Would Impose Untoward Burdens Upon Local Governments As Well As The Courts.

The regulation or prohibition of public nuisances is an important and necessary exercise of a municipality's police power. Interfering with efficient governmental operations by burdening it with an additional judicial process without analyzing the reasonableness of the conduct is again elevating form over substance. The judicially imposed requirement of a warrant under the circumstances of this case will clearly reduce the efficiency of Local Governments in abating public nuisances and in some cases will actually prevent abatement. Public entities already have limited resources with which to regulate and prohibit nuisances.

C. Qualified Immunity Should Be Granted Where No State Or Local Law Required A Warrant, No Specific Case Law Required A Warrant, And Where Two Federal Judges Conclude That A Warrant Is Not Required.

In this case the Santa Ana Municipal Code gave the individual defendants (petitioners herein) the authority to do exactly what they did; that is, enter a back yard without a warrant and seize vehicles which had been declared a nuisance.

It is inappropriate to subject police officers to a civil trial wherein punitive damages are requested against them because they allegedly failed to know "clearly established law" when there is an absence of specific case law prohibiting their acts, the State and Local laws permit the alleged unconstitutional acts, and two Federal Judges have concluded that the officers' actions were in fact

constitutional. If two Federal Judges have concluded that the actions of the City Officials were constitutional how can the same City Officials be held liable for not knowing that their actions were in fact clearly unconstitutional.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue from this honorable court to review the judgment of the United States Court of Appeals for the Ninth Circuit. In the event that the petition is granted, petitioners pray that the judgment of the court below be reversed.

DATED: May 29, 1990

KINKLE, RODIGER & SPRIGGS

By: _____

A. J. PYKA,
Attorney for Defendants,
CITY OF SANTA ANA

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE CONNER; LINDA CONNER,
Plaintiffs-Appellants/Cross-Appellees,

vs.

CITY OF SANTA ANA; ROBERT C. BOBB;
EDWARD J. COOPER; RAYMOND C. DAVIS;
C.R. MILLER, et al.,
Defendants-Appellees/Cross-Appellants.

Nos. 87-6683, 88-5510, 88-5511, 88-5512, 88-5536

D.C. No. CV-85-7918-FFF

OPINION

Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding

Argued and Submitted
May 2, 1989—Pasadena, California

Filed March 1, 1990

Before: Cecil F. Poole, Robert R. Beezer and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer; Dissent by Judge Trott

SUMMARY

Constitutional Law/Search and Seizure/Immunity

Affirming in part, and reversing and remanding in part, the court held that the fourth amendment protects citizens from a city's warrantless entry onto their proper5ty and from warrantless siezure of their automobiles even if the automobiles have been declared a public nuisance.

After appellant City of Santa Ana police were advised that appellees Dale and Linda Conner were storing several old and inoperable automobiles on their property, the police investigated on July 1, 1983. Without a warrant and without the Conners' permission, the police scaled the Conners' fence and inspected the automobiles. That same day, the City mailed to the Conners notice of its intention to abate and remove the automobiles. The Conners asked for and received a hearing from the police department, at which the hearing officer found that the automobiles constituted a public nuisance and should be abated. On appeal to the City Council, a hearing officer upheld the reasonableness of the police actions, but recommended that the Conners be given a thirty-day extension of time in which the Conners could prove that the automobiles were operable. The City Council accepted this recommendation, but rejected the extension of time. On June 7, 1985, the police called defendants California Towing and A & P Towing to the Conners' property, and city officials, again without a warrant, broke down the Conners' fence and removed two of the vehicles which were hauled away and destroyed. The Conners brought a 42 U.S.C. § 1983 action against all persons involved in the searches, seizures, and towing of their automobiles. The district court granted summary judgment to the Conners against

the City, but granted qualified immunity to all non-municipal defendants on the claim based on the July 1, 1983 entry and to all defendants on the June 7, 1985 warrantless seizure.

[1] The City did not appeal the grant of summary judgment against it for the warrantless entry on July 1, 1983. [2] However, the Conners appealed the district court's holding that the second entry onto the Conners' property was reasonable and did not require a warrant because it was preceded by numerous hearings and appeals. [3] Entry to abate a nuisance falls within the warrant requirement of the fourth amendment. California courts have rejected, for purposes of the warrant requirement, any distinction between inspection and abatement of a declared public nuisance. Furthermore, the Supreme Court has held in other contexts that a warrant is required for entry even after a violation of law is established. [4] The abatement hearings in this case established only the validity of the seizure. The district court found, in imposing a warrant requirement for the first search, that the Conners had a legitimate expectation of privacy in their enclosed, fenced yard. That expectation of privacy remained the same before and after the hearings.

[5] Qualified immunity from suit must be granted when the law allegedly violated is not clearly established. The district court concluded that the law was not clearly established because the municipal code seemingly authorizes the warrantless searches and seizures. However, the court found that the municipal code does not state that warrants are not required and that it was difficult to understand how the law requiring a warrant was anything but clear. Qualified immunity was erroneously granted to the non-municipal defendants. The reasonableness of

their actions is a question for the jury. The court concluded that the Conners' fourth amendment claim may proceed to trial against all defendants.

Judge Trott, in a separate opinion, dissented, stating that he respectfully believed that the majority opinion elevates form over substance. Guided by the text of the fourth amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are reasonable, he found no unreasonable search or seizure with respect to the warrantless entry after pre-abatement adversary hearings.

COUNSEL

William A. Snyder, Mission Viejo, California, for the plaintiffs-appellants/cross-appellees.

Gayle K. Tonon, Kinkle, Rodiger & Spriggs, Santa Ana, California, and Brian M. Brown, Tustin, California, for the defendants-appellees/cross-appellants.

OPINION

BEEZER, Circuit Judge:

These consolidated appeals stem from the City of Santa Ana's removal of automobiles from the Conners' private property after the Santa Ana City Council determined that the automobiles constituted a public nuisance. The parties appeal and cross-appeal from the judgment, grants of summary judgment, the granting of permanent injunctive relief, and from the award of attorneys fees. We affirm in part and reverse in part.

City of Santa Ana police were advised that the Conners were storing several old and seemingly inoperable automobiles on their property. Believing that the automobiles

may have constituted a public nuisance under the Santa Ana County municipal code,[1] the police investigated on July 1, 1983. Without a warrant and without the Conners' permission, the police scaled the fence on the Conner property and inspected the automobiles. The police inspected the vehicles and recorded the Vehicle Identification Numbers (VIN) and license plate numbers from the automobiles. That same day the City mailed to the Conners notice of its intention to abate and remove the automobiles. Pursuant to § 16-118 of the municipal code, the Conners asked for and received a hearing from the police department. The police department hearing officer found that the automobiles constituted a public nuisance, and that they should be abated. Pursuant to § 16-120 of the municipal code, the Conners appealed this determination to the Santa Ana City Council. The City Council appointed a hearing officer to receive evidence and statements and to file a recommendation. The hearing officer upheld the reasonableness of the police actions but recommended a thirty-day extension of time in which the Conners could prove the automobiles were operable. On February 19, 1985, the City Council adopted the hearing officer's recommendation, except that it rejected the recommended thirty-day extension of time.

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[1]Santa Ana Municipal Code § 16-110, et seq. contains the nuisance ordinance at issue. Section 16-116 provides:

> Authority to cause abatement and removal.
>
> Upon discovering the existence of an abandoned, wrecked, dismantled, or inoperable vehicle, or parts thereof, on private property or public property within the city, the chief of police or his designee shall have the authority to cause the abatement and removal thereof in accordance with the procedure prescribed herein and to arrange with and authorize private persons or city employees to accomplish such removal.

On June 7, 1985 the police called defendants California Towing and A & P Towing[2] to the Conners' property. City officials, again without a warrant, broke down the fence surrounding the Conner property and removed two of the vehicles from the property. The vehicles were hauled away and later destroyed.

The Conners brought this suit under 42 U.S.C. § 1983[3] against all persons involved in the searches, seizures, and the towing of their automobiles. The Conners' claims were based upon the warrantless searches and seizures and on the denial of due process. The district court granted summary judgment to the Conners against the City on the July 1, 1983 warrantless search and seizure. All non-municipal defendants were granted qualified immunity with regard to the claim based upon the July 1, 1983 entry. Summary judgment was granted to all defendants on the June 7, 1985 warrantless seizure. The district court granted summary judgment against the Conners on each of their due process claims. The question of damages for the City's unconstitutional July 1, 1983 warrantless search went to the jury and resulted in damages of $71,000.00. The district court also granted injunctive relief prohibiting further warrantless entries onto the Conner property. The Conners' attorney was awarded fees pursuant to 42 U.S.C. § 1988. These appeals and cross-appeals followed.

The grant or denial of summary judgment is a question of law reviewed de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

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[2]A & P settled before trial.

[3]The Conners do not appeal from the dismissal of their § 1985 and § 1986 claims.

Search and Seizure

[1] It is clear that the warrant requirement of the fourth amendment[4] applies to entries onto private land to search for and abate suspected nuisances. *Michigan v. Tyler*, 436 U.S. 499, 504-07 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). On the strength of those cases, the district court granted the Conners' summary judgment motion against the City of Santa Ana as to the July 1, 1983 warrantless entry. The City does not appeal from this grant of summary judgment.

[2] The district court concluded, however, that the warrantless seizure of the automobiles on June 7, 1985, did not violate the fourth amendment. The court held that the second entry onto the Conners' property was reasonable and did not require a warrant because it was preceded by numerous hearings and appeals. The court stated: "it is surely not reasonable to require a warrant to abate every nuisance . . . where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case." We disagree.

[3] Entry to abate a known nuisance falls within the warrant requirement of the fourth amendment. In *Michigan v. Tyler,* 436 U.S. 499 (1978), the Supreme Court stated:

> The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court,* 387 U.S. 523, 528, the

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[4]As applied to the states via the fourteenth amendment.

> "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to *locate and abate* a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. Seattle,* 387 U.S. 541; *Marshall v. Barlow's Inc.,* [436 U.S.307], at 311-313. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

436 U.S. at 504-505 (emphasis added). We do not agree that *Tyler* can be distinguished on the ground that it endorses a warrant requirement only for abatement of *suspected* nuisances. California courts have rejected, for purposes of the warrant requirement, any distinction between inspection and abatement of a declared public nuisance. In *Gleaves v. Waters,* 175 Cal.App.3d 413, 220 Cal.Rptr. 621 (1985), the court held that, absent exigent circumstances, "officials engaged in the abatement of a public nuisance must have a warrant" to enter an enclosed backyard; "it is the prospective invasion of constitutionally protected interests by an entry onto property and not the purpose of the entry which calls forth the warrant requirement." 220 Cal.Rptr. at 623 at 625. Furthermore, the Supreme Court has held in other contexts that a warrant is required for entry even after violation of a law is established. In *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977), the Court held unequivocally that non-exigent, warrantless entry onto a taxpayer's private property to seize assets in satisfaction of *assessed* tax deficiencies violates the warrant requirement of the fourth amendment. *Id.* at 354.

The City next argues that the second entry was reasonable and no warrant was required. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Supreme Court has instructed that:

> In construing this command [of reasonableness], there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (quoting *Camara v. Municipal Court,* 387 U.S. at 528-29). *See also Katz v. United States,* 389 U.S. 347, 356-57 (1967) ("Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment required [that] . . . searches conducted outside the judicial process . . . are *per se* unreasonable . . . subject only to a few specifically established and well-defined exceptions.") (citation omitted). The City of Santa Ana does not contend that the June 7 search of the Conner property falls within any of the "carefully defined classes of cases" which permit warrantless searches or seizures.[5] Instead, the City ar-

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[5]For a discussion of the exceptions to the fourth amendment warrant requirement, (e.g., warrantless entry justified by an emer-

gues that it afforded the Conners sufficient "process" to make proper under the fourth amendment the warrantless entry onto, and subsequent seizure of, the Conners' property.

We are unable to agree. Neither *Tyler* nor any case of which we are aware has created a "process" exception to the warrant requirement. The taxpayer in *G.M. Leasing,* for example, had numerous opportunities both before and after the taxes were assessed to rectify errors in the amount of the assessment, but the availability of such process to the taxpayer played no role in the Court's straightforward application of the fourth amendment to the warrantless seizures there at issue. *See* 429 U.S. at 341, 342 n. 5. On the contrary, the Court held that the validity of the tax assessments established only probable cause for the seizures and did *not* establish the reasonableness of entry onto private property without a warrant. *Id.* at 358 (recognizing tax statute as "an authorization for all forms of *seizure,* but as silent on the subject of intrusions into privacy") (emphasis in original).

[4] Similarly, the abatement hearings here established only the validity of the seizure. The district court found, in imposing a warrant requirement for the first search, that the Conners had a reasonable expectation of privacy in their enclosed, fenced yard. That expectation of privacy remained the same before and after the hearings. As the *G.M. Leasing* Court remarked:

> It is one thing to seize without a warrant property resting in an open area or *seizable by levy* without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . situated

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gency such as a fire) *see, e.g., United States v. Device, Labeled Theramatic,* 641 F.2d 1289, 1294-95 (9th Cir. 1981).

> on private premises to which access is not otherwise available for the seizing officer.

Id. at 354 (emphasis added).[6] *Cf. Michigan v. Clifford,* 464 U.S. 287, 292-93 (1984) (reasonable privacy expectation remains in fire-damaged premises, even when occupancy is impossible).

We concloude that the fourth amendment protected the Conners from the City's warrantless entry onto their property and from the warrantless seizure of their automobiles. The warrant requirement applied to the City when, without the Conners' consent, it broke down their fence, entered their property and seized the automobiles, regardless of how "reasonable" the warrantless search and seizure appeared in light of the pre-seizure process afforded the Conners. Because a search and seizure of the Conners' property occurred without any judicial authorization, the district court erred in granting summary judgment against the Conners for their claim based on the June 7, 1985 warrantless search and seizure. Accordingly, the grant of summary judgment is reversed and the case remanded for trial on that claim.[7]

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[6] The *G.M. Leasing* Court upheld a warrantless seizure of the taxpayer's automobiles because they were seized "on public streets, parking lots, or other open places, and did not involve an invasion of privacy." 492 U.S. at 351. By contrast, the Conners' automobiles were seized from their fenced, private property.

[7] Our holding that a warrant was required necessarily rests upon the absence of a judicial writ enforcing the City Council's nuisance determination. *G.M. Leasing,* 429 U.S. at 355-56 n. 20 (indicating that entry onto private land authorized by judicial writ is without the warrant requirement of the fourth amendment). *See also Shadwick v. City of Tampa,* 407 U.S. 345, 348-49 (1972), allowing magistrate to qualify as judicial officer, even if not a lawyer, so long as that person was neutral and detached, but noting: "The very term 'judicial officer'

Qualified Immunity

[5] The district court granted qualified immunity to all defendants except the City of Santa Ana. Qualified immunity from suit must be granted when the law allegedly violated is not clearly established. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In this case the district court concluded that the law was not clearly established because the municipal code seemingly authorized the warrantless searches and seizures. First, the municipal code does *not* state that warrants are not required.[8] Second, in light of *Tyler* it is difficult to understand how the law requiring a warrant was anything less than clear. Qualified immunity was erroneously granted to the non- municipal defendants.[9] The reasonableness of the non- municipal defendants' actions is a question of fact for the jury. *Benigni v. City of Hemet,* 868 F.2d 307, 313-14 (1989), *amended in unrelated part,* No. 87-5622 slip op. (9th Cir. June 15, 1989); *Brady v. Gebbie,* 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 1577 (1989). Accordingly, the Conners' fourth amendment claim may proceed to trial against all defendants.

Due Process

The Conners make several arguments that the defendants deprived them of their property without due process. The district court granted summary judgment against the Conners on their due process claims. We affirm.

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[8]In fact, the California Code sets out the procedures for obtaining a warrant for inspecting nuisances. Cal. Civ. Pro. Code § 1822.50, et. seq.

[9]Defendant California Towing's grant of qualified immunity must also be reversed as private parties acting under color of state law are not entitled to the qualified immunity defense. *F.E. Trotter, Inc. v. Watkins,* 869 F.2d 1312, 1318-19 (9th Cir. 1989).

The Conners first argue that they were deprived of due process because there was no judicial involvement in the process depriving them of their automobiles. We reject this argument. The fundamental requirements of procedural due process are notice and an opportunity to be heard before the government may deprive a person of a protected liberty or property interest. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). There is no requirement, however, that a court must be involved in the process in order to comply with the constitution. *Jordan v. City of Lake Oswego,* 734 F.2d 1374, 1376 n. 1 (9th Cir. 1984) ("There is no constitutional requirement that the decisionmaker be an involved person when a property interest protected by due process is at stake."); *Price v. City of Junction, Texas,* 711 F.2d 582, 589 n. 5 (5th Cir. 1983) ("There is no requirement that the impartial tribunal be a judicial tribunal."); *Stretten v. Wadsworth Veterans Hospital,* 537 F.2d 361, 369 n. 18 (9th Cir. 1976) (same). *See also Schweiker v. McClure,* 456 U.S. 188 (1982) (judicial involvement not required to meet the due process demand of an impartial tribunal). The Conners were afforded notice and several opportunities to be heard before their automobiles were seized by the City. Moreover, the Conners did have a right to judicial review of the City Council's action under Cal. Civ. Pro Code § 1094.5, a right which they did not exercise.

The Conners next argue that the municipal ordinance authorizing seizure of the automobiles constitutes an unconstitutional exercise of the City's delegated police power. This argument is meritless. The ordinance was authorized by state law and was within the police powers of the state. Cal. Gov't Code §§ 38771, 38773.5; Cal. Veh. Code § 22660 (authorizing municipal ordinances pertaining to inoperative vehicle nuisances); *Price,* 711 F.2d at

589 (dismissing a nearly identical argument). *See also* 6A *McQuillen Mun. Corp.*, § 24.28 (3rd ed. 1988).

The Conners next argue that they were denied the process because they were entitled to a jury trial on the question of whether the automobiles constituted a nuisance. They rely on *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d. 283, 231 P.2d 832 (1951). Their reliance is misplaced. *One 1941 Chevrolet Coupe* involved a *criminal* forfeiture proceeding and the court held that the right to a jury trial therefore attached. The City was proceeding to abate a nuisance; it was not proceeding under a criminal forfeiture statute. Therefore, a jury was not required to determine whether the Conners' automobiles constituted a nuisance under the City code. *Cf. One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (noting that forfeiture actions are quasi-criminal in nature).

Finally, the Conners contend that they were deprived of due process because illegally seized evidence — the vehicle identification numbers — was used as evidence in the pre-seizure hearings. We reject this argument. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (confession obtained in violation of fourth amendment not excludable in a civil deportation hearing); *United States v. Janis*, 428 U.S. 433 (1976) (fourth amendment did not require exclusion of illegally seized evidence in a civil tax enforcement case).

Accordingly, the district court correctly granted summary judgment against the Conners on their due process claims.

Damages

The City challenges the sufficiency of the evidence on the issue of damages. An award of damages will be upheld

if supported by substantial evidence and will not be disturbed unless it is clearly unsupported by the evidence. *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 770 (9th Cir. 1987). We have reviewed the trial record and conclude that the amount of damages awarded by the jury is supported by sufficient evidence. Accordingly, we affirm the damages awarded.

Injunctive Relief

The district court granted the Conners permanent injunctive relief from further warrantless entries. We review the grant of permanent injunctive relief for an abuse of discretion. *Transgo, Inc. v. Ajac Transmission Parts, Corp.*, 768 F.2d 1001, 1021-22 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). The relief will be upheld when "those against whom [it] is issued ... receive fair and well-defined notice of what the injunction prohibits." *Id.* at 1022. The district court granted the relief based upon its finding, unchallenged on appeal, that the City had violated the Conners' right to be free from unreasonable searches and seizures.

The City argues that the injunction is too vague as it prohibits warrantless entries onto the "curtilage of plaintiffs' home or homes". The City argues that the word "curtilage" renders the injunction impermissibly vague. We cannot agree. The meaning of curtilage may not be exact; it does, however, give sufficient notice to the City. *See United States v. Dunn*, 480 U.S. 294, 301 & n.4 (1987) (curtilage includes areas which harbor intimate activities of domestic life, usually to include fenced-in areas of property). The City also argues, in essence, that the injunction impermissibly encroaches upon their police power to make warrantless searches. We disagree. U.S. Const. amend IV.

We find no abuse of discretion and affirm the district court's grant of injunctive relief.

Attorney Fees

The City and the Conners contend that the amount of fees awarded was an abuse of discretion. *See Cunningham v. County of Los Angeles,* 879 F.2d 481, 483 (9th Cir. 1989) (fee awards are reviewed for an abuse of discretion), *cert. denied,* 110 S. Ct. 757 (1990). The district court thoroughly and exhaustively considered the fee application and considered all factors relevant to the award of fees under § 1988. *See id.,* 879 F.2d at 484-89 (setting forth standards applicable to fee determinations). The district court reduced by 40% the total number of hours awarded to reflect only partial success on the merits. The City contends that the district court incorrectly assessed fees against it and that the 40% reduction was too small.[10] The Conners' attorney argues that the reduction was too great. We disagree and conclude that the district court's careful consideration of all relevant factors produced an award of fees well within its discretion. Accordingly, we affirm the grant of fees.[11]

The City and the Conners seek fees for this appeal. We deny the City's request for fees because the Conners' unsuccessful claims were not frivolous, unreasonable or without foundation. *See Jensen v. City of San Jose,* 806 F.2d 899, 901 (9th Cir. 1986) (en banc) (where plaintiff's claims are not frivolous no fees are to be awarded to

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[10]The City incorrectly argues that the district court improperly allowed fees for administrative proceedings. *See Webb v. Dyer County Board of Education,* 471 U.S. 234 (1985) (district court has discretion to award such fees).

[11]Further fees would of course be proper if the Conners prevail on the claim remanded for trial.

defendant); *Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir. 1983) (same).

We award fees to the Conners' attorney for the issues on which the Conners have succeeded on the merits in this appeal. They have not succeeded on the merits on the issues to be reversed and remanded for further proceedings. *See Procter v. Consolidated Freightways Corp.,* 795 F.2d 1472, 1478-79 (9th Cir. 1986). They have, however, succeeded on the merits in *defending* the appeal with regard to: 1) the damages awarded, 2) the injunctive relief, and 3) the attorney fee award. Fees are appropriate for the time expended on appeal on those issues. *Chalmers v. County of Los Angeles,* 796 F.2d 1205, 1213 (1986), *amended in unrelated part,* 808 F.2d 1373 (9th Cir. 1987).

Counsel shall file a properly supported fee application detailing the hours expended on appeal upon the foregoing three issues. That fee application shall be submitted to the clerk of this court on or before [thirty days from filing]. Objections thereto, if any, shall be filed fifteen days thereafter.

Conclusion

The district court is reversed on the grant of summary judgment regarding the June 7, 1985 warrantless search and seizure and on the grant of summary judgment to the nonmunicipal defendants on the ground that they were entitled to qualified immunity. We affirm the district court on all other challenges. Accordingly, we remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

TROTT, Circuit Judge, dissenting:

I respectfully believe the majority opinion elevates form over substance. Guided by the text of the Fourth Amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are "reasonable" and which are not, I find no unreasonable search or seizure with respect to the warrantless entry after pre-abatement adversary hearings. Nor do I find any invasion of privacy. The lack of a case squarely on point blessing what happened here does not mean it cannot be proper; it only means that we must use analysis to decide this case, not round pegs and round holes. Moreover, the opinion raises problems with regard to the doctrine of qualified immunity.

THE SEARCH AND SEIZURE

The majority opinion appears fixated on what the police did not have (a warrant) when it should be examining both what the City did and what the Conners received in terms of process before the second entry. Instead, the majority opinion contains a statement that I find extraordinary under the circumstances of this unusual case: "... [the second entry and seizure violated the Fourth Amendment] regardless of how 'reasonble' the warrantless search and seizure appeared in light of the extensive pre-seizure process afforded the Conners." Majority opinion at p. 2304. This to me is tatamount to sweeping all the constitutional pieces off the chess board without following the rules of the contest. When you step back from the trees and and look at the forest, it becomes clear that the values designed to be protected by the Fourth Amendment were undisturbed by what the city did—and how it did it—in this case. A warrant—and the process used to attain it—would have added nothing to the Conner's

privacy in the light of the equivalent substitute process they did receive, or to the independent review to which they were entitled.

I do not quarrel with a finding that the initial July 1, 1983 warrantless entry for the purpose of *inspecting* the alleged nuisance was improper and a violation of the constitutional right to be free of illegal searches and seizures. But with respect to the warrantless second entry on June 7, 1985, I agree with the district court's reasoning, which was set forth in a thoughtful and informed Statement of Uncontroverted Facts and Conclusions of Law a follows:

> 8. As the [c]ourt noted at the June 29, 1987 hearing, the legality of the June 7, 1985 entry is more problematic. At that point, pre-abatement hearings had been held and the vehicles had actually been found to be public nuisances. The officers and tow truck operators entered plaintiffs' property solely to abate the previously declared nuisances. It is this crucial distinction between the first and second entries that troubled the [c]ourt and caused it to require further briefing.
>
> After thorough consideration of the issue, the [c]ourt now determines that the July 7, 1985 entry to abate the nuisances did not violate plaintiffs' constitutional rights.
>
> As stated above, the [c]ourt recognized that citizens have a right to be free from unauthorized

searches and seizures in their enclosed backyard. However, that does not mean that in a case where there has been notice, pre-abatement hearings, appeal procedures, and (under California law) the right to seek review in the [c]ourt system, those rights of the plaintiffs are violated merely because a warrant was not obtained prior to the entry to carry out the order of abatement. An entry for the purpose of carrying out an abatement cannot be said to be unreasonable under these circumstances. Indeed, to require a warrant after all of the above procedures have taken place would impose untoward burdens upon local government as well as the courts. This does not mean that a court should set aside the Constitution whenever it interferes with what some would consider to be efficient governmental operations, but it is surely not reasonable to require a warrant to abate every nuisance (for example, weeds, trash and wrecked cars) where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case.

Cases that deal with an entry to determine whether a nuisance exists on the property, *e.g.*, *Gleaves v. Waters*, 175 Cal.App. 3d 413 (1985), are not the same as this one. To allow entries into backyards for the purpose of inspecting the premises to find nuisances would effectively repeal the protections of the Fourth Amendment. However, that is not the situation where, as here, the presence of the nuisance is known, and has actually been determined in hearings that gave the citizen the full right to protect his interests and the opportunity to voluntarily abate the nuisance.

> Therefore, the [c]ourt determines that when the public officials entered the plaintiffs' backyard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure. Again, it should be clear that this decision is not intended to indicate there is no Fourth Amendment protection in one's enclosed backyard. Nor does the [c]ourt decide that it would be proper to forceably enter a house to abate what might be a nuisance located within the actual confines of the house. The [c]ourt only holds that the entry in this case did not violate the Fourth Amendment. Therefore, summary judgment should be, and is GRANTED for defendants on that issue.

An illegal search within the meanings of the Fourth Amendment occurs whenever one's reasonable expectation of privacy is violated by unreasonable governmental intrusion. *Katz v. United States*, 389 U.S. 347, 353 (1967). As was stated by the Supreme Court, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (emphasis added).

The reasons justifying a determination that the first entry violated the Fourth Amendment — reasonable expectations of privacy — do not appear to apply to the second entry and seizure. At the time of the second entry, there had been two years of notice, two pre-abatement hearings, appeal procedures, and the right to seek review in the state court system. At each step of the way, it was determined that a nuisance indeed existed, and that it was to be abated.

The second entry onto the Conners' property for the specific purpose of abating the nuisance was, in my view, neither unreasonable nor arbitrary. The Conners, or any other reasonable person, had to have seen it coming: the handwriting was on the wall. Regardless of what the Conners' subjective expectations may have been at that point, no reasonable privacy interests can be said to have remained. *See Michigan v. Clifford*, 464 U.S. 287, 292 (1984) ("The test essentially is an objective one").

The majority opinion seems to imply that a judicial warrant is required whenever an entry is made to abate an established nuisance irrespective of the underlying circumstances. Despite intensive research, I have been unable to uncover a case, state or federal, that supports directly that proposition. Dicta in *Michigan v. Tyler*, 436 U.S. 499 (1978) on which the proposed opinion largely relies, certainly is not supportive of the proposition. *See id.* at 504 ("Their purpose may be to *locate and abate* a *suspected* public nuisance . . . .") (emphasis added).

Indeed, California itself recognizes that a warrant is not necessarily required whenever governmental officials engage in the abatement of a nuisance:

> We do not mean to suggest or imply that the warrant requirement extends to all entries onto private property for nuisance abatement purposes, only those which infringe upon constitutionally recognized expectations of privacy.

Gleaves v. Waters, 175 Cal. App. 3d 413, 220 Cal. Rptr. 621, 625 (1985).

The view that, irrespective of the extensiveness of due process accorded people similarly situated to the Conners, a judicial authorization *must* be obtained prior to the enforcement of a City Council's nuisance determination

does not appear to be sound. To begin with, under the exercise of its police power, "a local legislative body may enact and enforce police ordinances to regulate or prohibit a thing or act of such nature that it may become a nuisance or may be injurious if not regulated or abated." Rhyne, *The Law of Local Government Operations* § 19.27, at 472 (1980); *see also Sullivan v. Los Angeles Dept. of Bldg. & Safety*, 116 Cal. App. 2d 807, 254 P.2d 590, 592 (1953) ("the exercise of the police power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court").

Secondly, I tend to agree with the district judge that requiring judicial authorization of an abatement determination "would impose untoward burdens upon local governments as well as the courts." *See Shadwick v. City of Tampa*, 407 U.S. 345, 353 (1972) ("Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judg or lawyers").

Third, in the Fourth Amendment context, the purpose of review by a "judicial officer" prior to issuance of a warrant is to "insure that the deliberate, impartal judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). There is nothing in the record to suggest that the city council — which is part of the legislative, not executive, branch of government — was anything but competent, impartial, neutral and detached. The hearings before the city council most assuredly constituted an adequate buffer between the municipal police officers and the Conners. For all practical purposes, the

conclusion that a nuisance existed in violation of municipal law, and was therefore subject to abatement pursuant to the governmental power of the municipality, was "judicially" determined. Moreover, an application for a search warrant is ex parte. The subject is never asked for his side of the story. In this sense, the Conners enjoyed an opportunity not available to the usual "suspect." As I stated at the outset, I am concerned that the majority's opinion elevates form over substance.

QUALIFIED IMMUNITY

I can agree with the majority opinion that the grant of qualified immunity as to the *initial* entry was erroneous. The mere absence of a provision in the municipal code requiring a warrant for inspecting suspected nuisances does not necessarily mean that the failure to obtain one was objectively reasonable, particularly in light of *Tyler*. *See Gleaves v. Waters,* 220 Cal. Rptr. at 625 ("The constitutional requirement of a warrant is not of course dependent upon the enactment by the legislature of an implementary procedure").

Even assuming, however, that the second entry and seizure violated the warrant requirement of the Fourth Amendment, I cannot find the individual qualifying defendants not entitled to qualified immunity. In the absence of specific case law on the subject, it seems wholly inappropriate to hold that a warrant requirement under the unusual circumstances of the second entry was "clearly established." *Anderson v. Creighton,* 483 U.S. 635 (1987). *Anderson* explained this doctrine as follows:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald,* 457 U.S., at 814 [457 U.S. 800

(1982)]. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonable have been thought consistent with the rights they are alleged to have violated. Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow,* 457 U.S., at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.,* at 818.

The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow.* Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified

> liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis, supra* at 195 [*Davis v. Scherer*, 468 U.S. 183, 195 (1984)] .... The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that *in the light of pre-existing law* the unlawfulness must be apparent.

483 U.S. at 638-640 (citations omitted) (footnote omitted) (emphasis added).

The Supreme Court calls upon us in *Davis v. Scherer*, 468 U.S. 183, 196 (1984), to recognize the demands of the real world in measuring activity by members of the executive branch:

> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules,

> "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

Today we fail to give that message due consideration. Instead, we subject officials to a trial under circumstances where four federal judges disagree as to whether what they did violated the Constitution, and we do so in an area of the law that has not been squarely addressed by this circuit. How we can say that the law they violated was "clearly established" at a particularized level escapes me.

I respectfully DISSENT.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Dale Conner and LINDA CONNER,
Plaintiffs,
vs.
CITY OF SANTA ANA, et al.
Defendants.

CV 85-7918 FFF

Filed August 6, 1987

Clerk U.S. District Court
Central District of California
by Chin, Deputy

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

This matter came on for hearing on June 29, 1987 on several motions for summary judgment filed by plaintiffs and the defendants before the Honorable Ferdinand F. Fernandez, United States District Judge, presiding.

The Court has considered the papers, evidence and argument of the parties and hereby enters the following Statement of Uncontroverted Facts and Conclusions of Law.

STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiffs Dale and Linda Conner are residents of the City of Santa Ana.

2. Defendant City of Santa Ana is a California municipal corporation.

3. Defendant Robert Bobb is the City Manager of the City of Santa Ana.

4. Defendant Edward J. Cooper is the City Attorney of the City of Santa Ana.

5. Defendant Raymond C. Davis is the Chief of Police for the City of Santa Ana.

6. Defendant C. R. Miller is a Captain of Police for the City of Santa Ana.

7. Defendant Greg Cooper is a Lieutenant of Police for the City of Santa Ana.

8. Defendant Lewis Garcia is a Abatement Officer for the City of Santa Ana.

9. Defendant Ken Hall is a Lieutenant of Police for the City of Santa Ana.

10. Defendant Richard Bowers is a Sergeant of Police for the City of Santa Ana.

11. Defendant Dan Felix is a Sergeant of Police for the City of Santa Ana.

12. Defendants Cabrerra, Vedborg, Taylor, Zavala, and S. Despenas are Police Officers for the City of Santa Ana.

13. Defendant Yancy's Body Shop, Inc., dba California Towing, is a California corporation doing business in the City of Santa Ana.

14. Defendants Fred Keen and Albert Watson dba A & P Santa Ana.

15. In March, 1983 the City of Santa Ana began receiving complaints from neighbors about inoperative vehicles on plaintiffs' property.

16. Defendant Garcia was assigned to investigate the complaints. He went to the plaintiffs' residence and observed several vehicles in the driveway, street and backyard. Garcia spoke with Mr. Conner and advised him that the Santa Ana Municipal Code prohibited him from storing inoperative vehicles outside his home. Garcia told Mr. Conner that the Municipal Code required that he either store the vehicles inside a building, or put them in running condition.

17. Garcia returned to the plaintiffs' residence on June 30, 1983 and saw that there had been no compliance with his request.

18. The next day, July 1, 1983, Garcia returned with defendant Bower and several other of the defendant police officers. Mrs. Conner was home, Mr. Conner was not.

19. Defendant Garcia told Mrs. Conner that he intended to go into plaintiffs' enclosed backyard to obtain the vehicle identification numbers ("VIN") of the cars that were stored there.

20. At that point, Mrs. Conner demanded to see a warrant and stated she would not let anyone into the backyard without one. Nevertheless, Garcia, at the direction of Bower, went to the rear of the backyard and, without a warrant, climbed over the fence and began to write down VIN and license plate numbers of the vehicles stored in the yard.

21. Defendant Cabrerra joined Garcia in the backyard to assist in the search. All told, the officers were in the

yard approximately 15 minutes. Mrs. Conner turned sprinklers on to try and force them to leave.

22. Later that same day (July 1, 1983), letters of abatement were sent to the plaintiffs on five vehicles stored in the backyard.

23. In accordance with the Municipal Code, plaintiffs appealed to defendant Davis for a hearing on the abatement notices. A hearing was set for July 29, 1983 before defendant Hall.

24. The plaintiffs objected to defendant Hall being the hearing officer. Accordingly, Hall was replaced with defendant Greg Cooper and the hearing was continued to August 5, 1983.

25. On August 5, 1983, the hearing was continued to August 17, 1983 because Mr. Conner was ill. On August 17, 1983 plaintiffs requested another continuance due to the fact Mr. Conner was incarcerated.

26. Defendant Cooper denied the request and held the hearing with Mrs. Conner and counsel present. Cooper traveled to the plaintiffs' residence to view the vehicles in question. He then found that each of them was a public nuisance and thus subject to the abatement procedures of the Santa Ana Municipal Code.

27. On August 29, 1983 plaintiffs appealed Cooper's decision to the Santa Ana City Council. The Council appointed Hearing Officer Harold Swatez to conduct a hearing and file a written recommendation.

28. Swatez conducted seven days of hearings spread throughout a period from April 20, 1984 to October 12, 1984. Final arguments were heard from both sides and the matter stood submitted on December 27, 1984.

29. Shortly thereafter, Swatez issued his recommendation. Specifically, he found that:

> . . . It would appear that the actions of the SAPD were within the provisions of the Santa Ana Municipal Code. However, to maintain harmony between the City of Santa Ana and its citizens, it would appear to be in everyone's interest to allow the appellants one final opportunity to prove the cars operable and/or to obtain a building permit and construct an enclosure for the above subject vehicles.

30. On February 19, 1985, the City Council adopted the Swatez recommendation. In other words, the Council found that the actions of the Police Department had been within the provisions of the Municipal Code, but that the plaintiffs be given 30 days to prove the vehicles operable or build an enclosure for them.

31. The plaintiffs did not avail themselves of this opportunity. Accordingly, on June 7, 1985 defendants California Towing and A & P Towing were called and told to meet with several of the defendant officers at a park near the plaintiffs' residence. The group then proceeded to the Conner residence, where they were joined by several individuals from the Santa Ana Maintenance Department.

32. The police officers and tow truck operators stood by while the Maintenance personnel proceeded to remove a sufficient portion of the fence enclosing plaintiffs' backyard to provide access to the stored cars.

33. The officers and tow trucks then went into the backyard, again without a warrant, and removed a 1968 Chevrolet and a 1968 Oldsmobile. The fence was then reassembled.

34. The vehicles were taken to the lots of A & P and California Towing, where several days later they were destroyed.

35. In pertinent part, the Santa Ana Municipal Code provides as follows:

Sec. 16-113. Administration and enforcement

> . . . In the enforcement of this article, such officer and his deputies may enter upon private or public property to examine a vehicle or parts thereof, or obtain information as to the identity of a vehicle and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this article.

Sec. 16-114. Authority to remove

> When the Chief of Police has arranged with any person or persons, to accomplish the removal of a vehicle or parts pursuant to this article, such person or persons shall be authorized to enter upon private property or public property for such purpose.

Sec. 16-117. Notices of intention to abate and remove; mailing; form of notices.

> A ten-day notice of intention to abate and remove the vehicle, or parts thereof, as a public nuisance shall be mailed by registered or certified mail to the owner of the land and to the owner of the vehicle, . . .

Sec. 16-118. Public hearing — Request by owner of vehicle or owner of land.

> Upon request by the owner of the vehicle or owner of the land . . . a public hearing shall be held by the Chief of Police or his designee on the question of abatement and removal of the vehicle, or parts

thereof, as an abandoned, wrecked, dismantled or inoperative vehicle . . .

Sec. 16-119. Same — Conduct; rules of evidence; appearance or statement of owner of land; determination by hearing officer; order, notice of decision.

. . . At the conclusion of the public hearing, the Chief of Police or his designee may find that a vehicle or parts thereof have been abandoned, wrecked, dismantled, or is inoperative on private or public property and order the same removed from the property as a public nuisance and disposed of as hereinafter provided . . . The order requiring removal shall include a description of the vehicle or parts thereof and the correct identification number and license of the vehicle, if available at the site.

Sec. 16-121. Disposition of vehicle after order of appeal.

Five (5) days after adoption of the order declaring the vehicle or parts thereof to be a public nuisance, five (5) days from the date of the mailing of notice of the decision of such notice is required by this article, or fifteen (15) days after such action of the City Council authorizing removal following appeal, the vehicle or parts thereof may be disposed of by removal to a scrap yard or automobile dismantlers' yard. After a vehicle has been removed, it shall not thereafter be reconstructed or made operable.

36. Plaintiffs filed the instant action on December 5, 1985. The Complaint states that it is being brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1986.

37. Plaintiffs did not segregate the Complaint into separate causes of action. Thus, the Complaint is not

precisely clear as to what claims are being pled. It appears, however, that plaintiffs allege that defendants' conduct has deprived them of the following constitutional rights:

(a) The right to be secure in their person and effects against unreasonable searches and seizures under the Fourth and Fourteenth

(b) The right not to be deprived of life, liberty or property without due process of law, and the right to the equal protection of the laws, under the Fifth and Fourteenth Amendments.

and

(c) The right to freedom of expression, and the right to petition the government for redress of grievances under the First Amendment.

38. The matter is now before the Court on motions for summary judgment filed by plaintiffs, the City defendants, A & P Towing and California Towing.

39. The motions were heard by the Court on June 29, 1987. At that time, the Court indicated that the quantity and quality of the papers filed on the motions left a great deal to be desired. Nevertheless, the Court waded through the morass and issued tentative rulings in several areas. The Court then ordered the parties to submit supplemental briefing on the narrow issue of whether a warrantless entry into a backyard to abate a nuisance is constitutional where there has been prior notice and a pre-abatement hearing in which the nuisance has been declared.

40. Those papers have now been filed and the Court has reviewed and considered them in issuing the within findings of fact and conclusions of law.

41. Any statement of fact inappropriately designated as a conclusion of law is incorporated herein.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1343.

2. The Court has personal jurisdiction over the parties. Venue is proper in this district.

3. It is apparent that plaintiffs' claim under 42 U.S.C. § 1985 is without merit. In order to recover on a claim under § 1985, a plaintiff must plead and prove that a racial or other class-based discriminatory animus is motivating the alleged actions. *United Brotherhood of Carpenters v. Scott,* 463 U.S. 835, 103 S.Ct. 3352 (1983). Here, plaintiffs present no evidence whatsoever of any such discrimination. Accordingly, summary judgment is hereby *GRANTED* for defendants on plaintiffs' claim under 42 U.S.C. § 1985. *See e.g., Rodgers v. Lincoln Towing Service,* 596 F.Supp. 13, 21 (N.D. Ill. 1984) ("Even if the statute [§ 1985] does extend somewhat beyond strictly racial classes, it clearly does not apply where there is no discreet, insular class defined by invidious criteria, but only an amorphous ill-defined group of people who share no common characteristic save a penchant for parking their cars where they may get towed away.")

4. Liability under 42 U.S.C. § 1986 depends on the existence of a valid claim under § 1985. *Mollnow v. Carlton,* 716 F.2d 627 (9th Cir. 1983). Accordingly, summary judgment for defendants is also *GRANTED* on plaintiffs' claim under § 1986.

5. Plaintiffs' claim for violation of First Amendment rights is meritless. There is absolutely no principle that allows an individual to convert ownership of several old

automobiles into a lofty assertion of constitutionally guaranteed free speech. If that were the case, then the First Amendment would be trivialized and would ultimately be "discredited by being overdone." *Douglas v. City of Jeannette,* 319 U.S. 157, 181, 63 S.Ct. 882, 889 (1943) (Jackson, J., concurring). Accordingly, summary judgment is *GRANTED* for defendants on plaintiffs' claim based upon the First Amendment.

6. Plaintiffs' procedural due process claim is also without merit. Plaintiffs were given two pre-abatement hearings, with the second one running for several days. Subsequent to the hearings, plaintiffs still refuse to comply with the law and refused the City's invitation to make the vehicles operable. Moreover, plaintiffs declined to avail themselves of Cal. Civ. Proc. Code § 1094.5, a yet further avenue of review available to them.

Plaintiffs' attempt to attach significance to the fact a hearing was not provided after the vehicles were removed is without merit. Cases such as *Parks v. "Mr. Ford",* 556 F.2d 132 (3rd. Cir. 1976) are easily distinguishable from the facts of this case. For instance, in *Parks,* the Pennsylvania statute permitted the owner to be permanently deprived of his vehicle without any hearing whatsoever. Here, several days of hearings were conducted prior to the nuisances being abated. In short, plaintiffs clearly received all the process they were due. Nothing further was required under the Constitution after the vehicles were removed from the backyard. Summary judgment for defendants is therefore *GRANTED* on plaintiffs' procedural due process claim.

7. As for the Fourth Amendment claims concerning the two entries into plaintiffs' backyard, the Court grants summary judgment for plaintiffs on the July 1, 1983 entry to obtain VIN numbers.

It has long been established that entries onto private property to search for a suspected nuisance are governed by the warrant requirement of the Fourth Amendment. *Michigan v. Tyler,* 436 U.S. 505, 98 S.Ct. 1042 (1978); *Camara v. Municipal Court,* 387 U.S. 530, 87 S.Ct. 1727 (1967). Thus, where there is a legitimate privacy interest in the property entered, a warrantless and non-consensual entry is permissible only where exigent circumstances justify the intrusion. *Michigan v. Clifford,* 464 U.S. 287, 104 S.Ct. 641 (1984).

Here, it is most surprising to see the defendants suggest that plaintiffs did not have a legitimate expectation of privacy in their enclosed backyard. While the question of how far the curtilage of the home extends is open to debate, it surely extends to an enclosed backyard. *See e.g., Fixel v. Wainwright,* 492 F.2d 480, 483 (5th Cir. 1974) (quoting the Webster's Dictionary definition of curtilage as the "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house."); *see also, United States v. Dunn,* U.S. , 107 S.Ct. 1134, 1139 n.4 (1987) (government itself acknowledges that the curtilage extends to the "nearest fence surrounding a fenced house.").

Accordingly, the July 1, 1983 warrantless entry by officers Garcia and Cabrerra, at the direction of Sergeant Bower, was improper and constituted a violation of plaintiffs' constitutional right to be free of illegal searches and seizures. Summary judgment for plaintiffs is therefore *GRANTED* on that claim. As will appear below, this is only against the City of Santa Ana.

8. As the Court noted at the June 29, 1987 hearing, the legality of the June 7, 1985 entry is more problematic. At that point, pre-abatement hearings had been held and the vehicles had actually been found to be public nuisances.

The officers and tow truck operators entered plaintiffs' property solely to abate the previously declared nuisances. It is this crucial distinction between the first and second entries that troubled the Court and caused it to require further briefing.

After thorough consideration of the issue, the Court now determines that the July 7, 1985 entry to abate the nuisances did not violate plaintiffs' constitutional rights.

As stated above, the Court recognizes that citizens have a right to be free from unauthorized searches and seizures in their enclosed backyard. However, that does not mean that in a case where there has been notice, pre-abatement hearings, appeal procedures, and (under California law) the right to seek review in the Court system, those rights of the plaintiffs are violated merely because a warrant was not obtained prior to the entry to carry out the order of abatement. An entry for the purpose of carrying out an abatement cannot be said to be unreasonable under these circumstances. Indeed, to require a warrant after all of the above procedures have taken place would impose untoward burdens upon local governments as well as the courts. This does not mean that a court should set aside the Constitution whenever it interferes with what some would consider to be efficient governmental operations, but it is surely not reasonable to require a warrant to abate every nuisance (for example, weeds, trash and wrecked cars) where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case.

Cases that deal with an entry to determine whether a nuisance exists on the property, *e.g., Gleaves v. Waters,* 175 Cal.App. 3d 413 (1985), are not the same as this one. To allow entries into backyards for the purpose of in-

specting the premises to find nuisances would effectively repeal the protections of the Fourth Amendment. However, that is not the situation where, as here, the presence of the nuisance is known, and has actually been determined in hearings that gave the citizen the full right to protect his interests and the opportunity to voluntarily abate the nuisance.

Therefore, the Court determines that when the public officials entered the plaintiffs' backyard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure. Again, it should be clear that this decision is not intended to indicate there is no Fourth Amendment protection in one's enclosed backyard. Nor does the Court decide that it would be proper to forceably enter a house to abate what might be a nuisance located within the actual confines of the house. The Court only holds that the entry in this case did not violate the Fourth Amendment. Therefore, summary judgment should be, and is *GRANTED* for defendants on that issue.

9. Finally, the Court determines that the individual defendants are entitled to qualified immunity from liability for the unconstitutional search and seizure on July 1, 1983.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982). In other words, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malloy v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). With respect to unconstitutional warrantless

searches, the Supreme Court decided this past term that the officers conducting the search are entitled to qualified immunity as long as their belief that the search was proper was objectively reasonable. *Anderson v. Creighton,* ____ U.S. ____, 55 U.S.L.W. 5092 (June 25, 1987).

Here, the Court finds that the belief of defendants Garcia, Cabrerra and Bower that a warrant was not necessary before entering plaintiffs' yard to obtain the VIN numbers was objectively reasonable. Section 16-113 of the Municipal Code gave the defendants the apparent authority to do exactly what they did; that is, enter the backyard without a warrant to obtain identifying information.[1]

The fact this Court questions the constitutionality of that section as applied to the entry in question does not control the immunity issue. *Cf., Illinois v. Krull,* ____ U.S. ____, 107 S.Ct. 1160 (1987) (the exclusionary rule does not apply to evidence obtained by police acting on objectively reasonable reliance on a statute authorizing warrantless searches even if the statute is later found to be unconstitutional).

The Court acknowledges that at first blush *Freeman v. Blair,* 793 F.2d 166 (8th Cir. 1986) appears to support plaintiffs' position that defendants should not be granted immunity in this case. *Freeman,* however, involved an attempted warrantless search of a campground with no probable cause whatsoever to suspect that any unlawful acts were being conducted on the grounds. In the instant case, the violations were already known to the officers before the entry was made. The purpose of the search was to obtain identification numbers. Moreover, the authoritative value of *Freeman* is severely undermined by subsequent Supreme Court authority. *See e.g., Anderson v. Creighton, supra; New York v. Burger,* 55 U.S.L.W. 4890

(June 19, 1987). Finally, to the extent *Freeman* is applicable, this Court respectfully disagrees with its determination.

10. If it were decided that the search and seizure of June 7, 1985 was also unconstitutional, the principles set forth in paragraph 9 apply even more strongly to that incident. As the Court pointed out in paragraph 8, the law is far from clear. Surely, the individuals and entities who participated in that incident cannot be said to be knowing violators of the law.

11. Accordingly, all defendants except the City of Santa Ana are immune from liability and summary judgment is therefore *GRANTED* in their favor.

12. In sum, this case shall proceed on a Section 1983 claim by the plaintiffs against the City of Santa Ana for damages caused by the unconstitutional entry into plaintiffs' backyard on July 1, 1983.[2] Summary judgment is *GRANTED* for the other defendants in all other respects.[3]

13. Any conclusion of law inappropriately designated as a statement of fact is incorporated herein.

14. The Court incorporated its comments from the bench on June 29, 1987 as a further explanation of its determinations.

15. Defendants shall prepare an appropriate form of Order and Judgment and serve it and file it in accordance with Local Rule 14.

DATED: August 6, 1987

FERDINAND F. FERNANDEZ

FERDINAND F. FERNANDEZ
United States District Judge

FOOTNOTES

1. *See also,* Restatement (Second) of Torts § 202. "A public officer who by virtue of his office or by statute is authorized to abate a public nuisance, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of another for the purpose of abating such a nuisance."

2. Proof of a single incident of unconstitutional activity is sufficient to impose liability against a municipality under *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, where the incident was caused by an existing unconstitutional municipal policy. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S.Ct. 2427 (1985).

3. Obviously, this does not apply to the following parties who have already settled with the plaintiffs: Fred Keen and Albert L. Waston dba A & P Towing, A & P Towing and/or Santa Ana Towing dba A & P Towing. (Order of Dismissal filed August 5, 1987).

Dated: August 6, 1987

Supreme Court, U.S.
FILED
AUG 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1875

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Petitioners,
vs.
DALE CONNER AND LINDA CONNER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. SNYDER
27001 La Paz Road
Suite 300
Mission Viejo, California 92691
(714) 837-3613
Attorney for Respondents.

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

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LISTING OF THE PARTIES

Dale Conner and Linda Conner; Respondents herein, appeared before the United States Court of Appeals for the Ninth Circuit as appellants in docket number 87-6683 and as cross-appellees in docket numbers 88-5510, 88-5512 and 88-5536. All appeals were consolidated before the United States Court of Appeals for the Ninth Circuit.

City of Santa Ana; Petitioner herein, appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683 and as cross-appellants in docket numbers 88-5510, 88-5512 and 88-5536.

Yancy's Auto Body, Inc., dba California Towing; Appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683.

Robert Bobb, Edward J. Cooper, Raymond C. Davis, Capt. C. R. Miller, Lt. Greg Cooper, Lt. Ken Hall, Sgt. Richard Bower, Sgt. Dan Felix, Abatement Officer Louis Garcia, Officer Michael Cabrerra, Officer Eric Vedborg, Officer John Taylor, Officer Marco Zavala, Officer Steve Despenas; Appeared before the United States Court of Appeals for the Ninth Circuit as appellees in docket number 87-6683.

STATUTES INVOLVED

Santa Ana Municipal Code;

> "the presence of an abandoned, wrecked, or dismantled or inoperative vehicle, or part thereof, on private . . . property . . . is hereby declared to constitute a public nuisance."

S.A.M.C., section 16-110.

Administration and Enforcement

> . . . In the enforcement of this article, such officer and his deputies may enter upon private or public property to examine a vehicle or parts thereof, or obtain information as to the identity of a vehicle and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this acticle.

S.A.M.C., section 16-113.

Authority to Remove

> When the Chief of Police has arranged with any person or persons, to accomplish the removal of a

vehicle or parts pursuant to this article, such person or persons shall be authorized to enter upon private property or public property for such purpose.

S.A.M.C., section 16-114.

Disposition of Vehicle After Order of Appeal

Five (5) days after adoption of the order declaring the vehicle or parts thereof to be a public nuisance, five (5) days from the date of mailing of notice of decision if such notice is required by this article, or fifteen (15) days after such action of the City Council authorizing removal following appeal, the vehicle or parts thereof may be disposed of by removal to a scrap yard or automobile dismantlers' yard. . . .

S.A.M.C., section 16-121.

Inoperative vehicle

Any vehicle, either mechanically or legally incapable of being driven on a public street or highway.

S.A.M.C., section 41-80.

California Code of Civil Procedure

Title 13 Inspection Warrants [Appendix A]

Section 1822.50 — Definition.

Section 1822.51 — Affidavit for issuance of warrant.

Section 1822.52 — Grounds for issuance.

Section 1822.53 — Examination of witnesses.

Section 1822.54 — Issuance and contents of warrant.

Section 1822.55 — Duration of warrant; Extension or renewal; Execution: Return.

Section 1855.56 — Manner of inspection; Notice.

Section 1855.57 — Refusal to permit inspection.

STATEMENT OF THE CASE

The Uncontroverted Facts

In March, 1983, the City of Santa Ana, by Police Lt. Cooper, assigned Abatement Officer Garcia to investigate complaints of inoperative vehicles on respondents' property. Under the terms of the Santa Ana Municipal Code, the Abatement Officer was concerned only with whether the motor vehicles were legally and mechanically operable. The Vehicle Abatement Manual of the Santa Ana Police Department further defined "inoperable" vehicles as including those with flat tires, dead batteries or unregistered with the Department of Motor Vehicles.

On July 1, 1983, after visiting respondents' home the prior day, Abatement Officer Garcia arrived at respondents' home with at least five other officers [appellees before the Ninth Circuit]. At the direction of Sgt. Bower, Abatement Officer Garcia entered the enclosed backyard of respondents without a warrant, and over the express objection of Mrs. Linda Conner, accompanied by officer Michael Cabrerra, while the other officers [Eric Vedborg, John Taylor, Marco Zavala] stood by to assist. Sgt. Bower had ordered the search to determine if any of vehicles were possible public nuisances under the Santa Ana Municipal Code.

Officers Garcia and Cabrerra proceeded to walk on the tops, hoods, and trunks of several cars stored in the backyard, and thereafter searched the vehicles and obtained vehicle identification numbers [V.I.N.s] of five vehicles discovered in the backyard. Abatement Officer Garcia used the V.I.N.s secured during the search of the cars to run a stolen vehicle check and to process abatement citations on the five vehicles that same day. The

Conners asked for and received a hearing from the police department regarding the City's notice.

Lt. Cooper was appointed by the Police Chief to decide the question of whether the Conner's vehicles were "inoperable". Prior to the hearing, the Police Chief was advised by his traffic commander that "special interest vehicles, as defined in the California Vehicle Code, currently fall within the parameters of our abatement ordinance", but that "California Vehicle Code Section 5052 allows a collector to store one or more historic or special interest vehicles outdoors on private property."

The initial abatement hearing was conducted by Lt. Cooper who decided that the five vehicles were "inoperable", but did not consider whether they were classic and/or special interest vehicles or whether they were a "public nuisance" as defined by the California Civil Code. *See* Appendix B. On August 23, 1983, the Police Chief issued a decision finding the vehicles "abatable".

The Conners appealed to the Santa Ana City Council. The City Council appointed a Hearing Officer to conduct a hearing and file a written recommendation. After conducting the hearing, the Hearing Officer concluded that the Conners had presented unrebutted evidence that the vehicles in question were classics and/or special interest vehicles and therefore protected under the California Vehicle Code, sections 5050, 5051 and 5052 thereof. The Hearing Officer decided however, that the Vehicle Code defers to local ordinances and that the S.A.M.C. specifically required the vehicles be enclosed in a building [S.A.M.C., section 16-112].

The Hearing Officer recommended that Mr. Conner be given one 30 day extension within which to prove that the vehicles in question were operable or to obtain a building

permit. The Hearing Officer concluded that it appeared that "the actions of the SAPD were within the provisions of the Santa Ana Municipal Code". On February 19, 1985, the City Council adopted the Hearing Officer's recommendation, but denied the thirty day extension.

On June 7, 1985, [108 days after the City Council's adoption of the recommendation], city officials removed a portion of the fence enclosing the Conner's backyard while the Conners were not at home, and without a warrant, entered the backyard to remove two vehicles which had remained in the yard after the Conners had removed three of the others. The two vehicles were seized by the officials and towed away by tow trucks called to assist and thereafter summarily destroyed pursuant to municipal policy. Officers Felix, Garcia and Despenas were municipal officials involved in this second warrantless search and seizure.

Lt. Ken Hall was the traffic commander of the Traffic Section for the Santa Ana Police Department from November, 1982, through at least May 21, 1986. As traffic commander, Lt. Hall was the supervisory official responsible for the abatement detail and was also the official who had been delegated the responsibility to train the Abatement Officer with regard to Abatement Procedures on behalf of the Santa Ana Police Department.

During the period that Lt. Hall was traffic commander in charge of the abatement detail, he did not author, assemble, compile or approve any documents, orders, training bulletins or memordanda concerning the duties and responsibilities of Abatement Officers for the City of Santa Ana. During this period, the official policy of the City of Santa Ana was that its municipal code permitted warrantless searches of residential premises to permit

inspection for, and abatement of, inoperative motor vehicles.

Lt. Hall had also directed Abatement Officer Garcia to have the Conner vehicles towed away from their backyard sometime after February 19, 1985 [the date of the City Council's action adopting the recommendations of its Hearing Officer].

The Claims of Respondents

The Conners brought suit under 42 U.S.C. section 1983 contending, among other things, that the warrantless entries of July 1, 1983 and June 7, 1985, together with the warrantless seizure of the two vehicles on June 7, 1985, had violated their rights under the Fourth Amendment to the United States Constitution.

The Conners also contended that the use of illegally seized evidence in the context of the municipal hearing as a matter of municipal policy, had violated their rights to due process of law under the Fifth and Fourteenth Amendments, and that the summary destruction of their property without judicial authorization or intervention similarly violated their Fifth and Fourteenth Amendment rights to due process.

The Rulings Below

On August 12, 1987, the district court granted, in part, the Conners' motion for summary judgment, finding that the warrantless, non-exigent search of July 1, 1983, violated the Fourth Amendment rights of the Conners. The district court granted petitioner's motion for summary judgment on the Conners' claim that the search and seizure of June 7, 1985, violated their Fourth Amendment rights and upon all other claims.

The district court also held that the officers who had conducted the searches, those who had assisted, as well as their supervisors and training officers, were immune from liability based upon qualified immunity, finding that the law governing nuisance abatement searches was not sufficiently established to impose individual liability.

On March 1, 1990, the Ninth Circuit Court of Appeals reversed, in part, the previous judgment of the district court. The Court of Appeals held that the Fourth Amendment's warrant protection applied not only to the initial, non-exigent search of July 1, 1983, but to the second non-exigent search and seizure of June 7, 1985, as well. The Court of Appeals held that in light of *Michigan v. Tyler,* 436 U.S. 499, 504-07, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978), the law requiring a warrant to search for and abate a known public nuisance was clearly established as of July 1, 1983 and June 7, 1985. The Court of Appeals reversed the district court's grant of summary judgment to the individual defendants.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit was consistent with the prior decisions of this Court in *Michigan v. Tyler, supra,* and *Camara v. Municipal Court,* 387 U.S. 523, and not in conflict with a decision of any United States Court of Appeals on the matter; the decision was consistent with the decision of a California Court of Appeals on a closely analogous, if not identical, question of federal law, *Gleaves v. Waters,* 175 Cal. App. 3d 413, 220 Cal.Rptr. 621 (1985); the decision refusing to grant qualified immunity as a matter of law, where the municipal actors violate clearly established law, was well within the accepted and usual course of judicial proceed-

ings, e.g., *Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987).

REASONS FOR DENYING THE PETITION

1. The Character of the Reasons for Certiorari Set Forth in Rule 10 Are Not Present Here.

Rule 10 of the Rules of the Supreme Court indicates the character of reasons that will be considered by the Court in exercising its discretion to grant a petition for writ of certiorari. Rule 10 (1) expessly notes that a petition for writ of certiorari will be granted only when there are special and important reasons therefor.

The decision of the Court of Appeals for the Ninth Circuit was not in conflict with any decision of another United States Court of Appeals on the same matter; did not decide a federal question in a way which was in conflict with a state court of last resort; and was not a far departure from the accepted and usual course of judicial proceedings. In fact, the decision of the Court of Appeals for the Ninth Circuit was in accordance with previous decisions of this Court; decided a federal question consistent with a state court of appeals; and was clearly within the accepted and usual course of judicial proceedings.

2. The Ninth Circuit's Decision Was Consistent With Prior Decisions of This Court.

In holding the entry and seizure of June 7, 1985, to be governed by the fourth amendment's warrant requirement, the Court of Appeals noted that the Supreme Court has instructed that;

> "In construing this command]of reasonableness], there has been general agreement that "except in

> certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

Opinion at 9a, citing, *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *Katz v. United States*, 389 U.S. 347, 356-57 (1967).

The Court of Appeals correctly noted that the petitioner had never made any contention that the June 7, 1985 action fell within any of the " 'carefully defined classes of cases' which permit warrantless searches or seizures." Rather, the City of Santa Ana, without benefit of any authority whatsoever, urged a new "adequate alternative process" exception to the warrant requirement. The Court of Appeals noted that *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 341, 342 n. 5 (1977), the taxpayer had numerous procedural opportunities prior to assessment, but such process played no role in the Court's application of the fourth amendment to the warrantless seizure there at issue.

Contrary to the contentions of the petitioner, the "extensive Pre-abatement Procedures" were not an adequate substitute for the participation of a neutral and detached magistrate. Neither the Hearing Officer nor the City Council ever issued a formal "abatement order" authorizing the removal of the vehicles after appeal.

Moreover, during the 108 days between the City Council's adoption of the Hearing Officer's recommendations and the time of the June 7, 1985 seizure, the respondents voluntarily took action to "abate" the "declared nuisance" by removing the majority of the offending vehicles from the premises. This fact is gleaned merely from

noting that five cars were cited on July 1, 1983, yet only two were present when seized on June 7, 1985.

3. The Ninth Circuit Was Correct in Ruling That Clearly Established Constitutional Law Was Violated.

Petitioners argue that they should be entitled to qualified immunity as a matter of law, arguing that their failure to be cognizant of the clearly established law was due to the absence of specific case law. This Court has previously held that it is *not* the case that an official action is protected by qualified immunity unless the very action in question has previously been held unconstitutional. *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 531, 107 S.Ct. 3034 (1987).

In *Anderson, supra*, this Court held that in order to hold a municipal official individually liable, the right the official is alleged to have violated must be "clearly established" in the sense that;

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [that] is to say that in the light of preexisting law the unlawfulness must be apparent."

Id, 97 L.Ed.2d at 531.

This Court has previously held that government officials must be held to a standard of conduct based on knowledge of basic, unquestioned constitutional rights. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000-1001, 43 L.Ed.2d 214 (1975). In determining whether the law was "clearly established" the Court of Appeals for the Ninth Circuit holds that the reviewing court must look at: (a) binding precedent; or, in the absence thereof, (b) all

available decisional law including decisions of state courts, other circuits, and district court to determine whether the right was clearly established. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986); *Capeoman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985).

The Court of Appeals for the Ninth Circuit did not err when it held that the law requiring a search warrant to abate a known public nuisance in a non-exigent context, was "clearly established" by the Supreme Court's decision in *Michigan v. Tyler, supra*, and *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). The language of this Court was precise;

> "The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. . . . These deviations from the typical police search are thus clearly within the protections of the Fourth Amendment."

Michigan v. Tyler, supra, 436 U.S. at 504-505.

Even if one does not wish to consider *Tyler* and *Camara* as "binding precedent", these cases nevertheless serve to assist in establishing the contours of the fourth amendment warrant protections in the context of nuisance abatement searches.

Petitioners further contend that State and Local laws permitted their unconstitutional actions, again stating that the S.A.M.C. gave them authority to make warrantless searches and seizures of inoperable vehicles. This is simply not so. The Court of Appeals for the Ninth Circuit noted the existence of the state warrant procedures in denying petitioners' contention that state law permitted these warrantless abatement searches. *See* Opinion at p. 12a n.8 and Appendix A.

Moreover, the Court of Appeals correctly noted that "the municipal code does *not* state that warrants are not required." *See* Opinion at p. 12a. This Court has previously held that where a statutory scheme authorizes inspections, but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S.Ct. 774, 777, 25 L.Ed.2d 60 (1970).

Petitioners desperately argue that two federal judges concluded that petitioners did not violate respondents' constitutional rights and thus petitioners should not be held to answer for their actions. This argument ignores several relevant points: (1) the two federal judges referred to were the trial court judge, whose decision was overruled by the court of appeals, and the dissenting justice of the court of appeals for the ninth circuit; (2) each of these judges concluded that petitioners' actions of July 1, 1983, violated clearly established law and disagreed only with respect to the second warrantless and non-exigent search and seizure occurring on June 7, 1985; (3) each of these judges were advancing an unprecedented theory as an exception to the long held presumption that warrantless searches are unreasonable *per se*.

The Court of Appeals for the Ninth Circuit did not err in remanding for trial, the individual municipal defendants' claim that objective facts existed which led them to reasonably believe that the law permitted them to conduct warrantless non-exigent searches for inoperable vehicles deemed a public nuisance, even though such action was unconstitutional under clearly established law.

4. Requiring Municipal Officials to Comply With the Warrant Requirement in the Context of Non-Exigent Nuisance Abatement Searches and Seizures Does Not Unduly Burden Local Government.

Requiring a municipal official to obtain a warrant prior to seizing an inoperable vehicle located in an enclosed residential backyard is neither too burdensome nor against public policy. The warrant requirement is easily met, and as Justice Trott noted during oral argument, telephonic warrants have become a routine too, available where appropriate.

Moreover, the Court of Appeals correctly noted that the California legislature has provided a mechanism for obtaining a warrant to permit an inspection for nuisances. *See,* Cal. C. Civ. Pro. section 1822.50, et seq. at appendix A hereto. Satisfying the legislative requirements for such a warrant is made simple and routine.

The warrant limitation imposed by the California legislature is consistent with the principle expressed by this Court in *Welsh v. Wisconsin,* 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984), where the Court observed that long-recognized principles prohibit warrantless searches of the home;

> "... application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed."

Id., 466 U.S. at 753.

At least one other appellate court has upheld a warrant requirement in the context of public nuisance abatement. *See,* e.g., *Gleaves v. Waters,* 175 Cal. App. 3d 413, 419, 220 Cal.Rptr. 621, (1985) (absent exigent circumstances, "of-

cials engaged in the abatement of a public nuisance" must have a warrant to enter an enclosed backyard).

In this instance, petitioners contend that the "offense" of maintaining an inoperable vehicle in one's enclosed residential backyard is of such severity as to justify the elimination of the fourth amendment's warrant protection and permit wholesale warrantless searches to facilitate the seizure of these vehicles, even in the absence of exigent circumstances.

Respondent's alleged "offense" was not so severe. The City's own Hearing Officer found unrebutted evidence that the vehicles were "classic and/or special interest vehicles" protected by California Vehicle Code, section 5052 [which permitted storage of such vehicles], but noted that Santa Ana's ordinance required that the cars be stored in a building. It was this fact alone that rendered the vehicles "abatable" under Santa Ana ordinance. No contention was ever made that the vehicles constituted a health hazard or were a threat to public safety. This is not the context within which to dispose of the warrant protections of the fourth amendment.[1]

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[1]State courts which have considered ordinances analogous to Santa Ana's have declared such *per se* definitions of nuisance unconstitutional and violative of due process. *See,* e.g., *Kadish v. Williamsport,* 19 Pa. Cmwlth. 643, 340 A.2d 617 (1970) (storage of autos may not be nuisance *per se,* but must be shown to be nuisance on basis of danger to public health and welfare); *Cf., Scottsbluff v. Winters Creek Coal Co.,* 155 Neb. 723, 53 N.W.2d 543 (1952). California courts have also recognized that a valid presumption must rely on a rational connection between the proven fact and ultimate fact. *In Re McGowen's Estate,* 35 Cal.App.3d 611, 111 Cal.Rptr. 39 (1973). The Court of Appeals for the Ninth Circuit rejected respondents due process challenge to the ordinance.

CONCLUSION

Based upon the foregoing, respondents respectfully urge this Court to deny the pending petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: August 16, 1990.

LAW OFFICE OF WILLIAM A. SNYDER

WILLIAM A. SNYDER

William A. Snyder
Attorney for Respondents
Dale Conner and Linda Conner

TITLE 13

Inspection Warrants

§ 1822.50. Definition.
§ 1822.51. Affidavit for issuance of warrant.
§ 1822.52. Grounds for issuance.
§ 1822.53. Examination of witnesses.
§ 1822.54. Issuance of contents of warrant.
§ 1822.55. Duration of warrant: Extension or renewal: Execution: Return.
§ 1822.56. Manner of inspection; Notice.
§ 1822.57. Refusal to permit inspection.
§ 1822.58. Inspections by personnel of Fish and Game Department.
§ 1822.59. Inspections for purpose of animal or plant pest or disease eradication.

Cal Jur 3d (Rev) Criminal Law §§ 2519, 2529, 2551.

§ 1822.50. [Definition.] An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning. [1968 ch 1097 § 1; 1980 ch 230 § 1.] *Cal Jur 3d Agriculture § 15, Process, Notices, and Subpoenas § 40, Witkin Summary (8th ed) p 1802.*

§ 1822.51. [Affidavit for issuance of warrant] An inspection shall be issued upon cause, unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made. In addition, the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent. Amended Stats 1984 ch 476 § 2. *Cal Jur 3d (Rev) Criminal Law § 2523.*

§ 1822.52. [Grounds for issuance.] Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area in-

spection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2522.*

§ 1822.53. [Examination of witnesses.] Before issuing an inspection warrant, the judge may examine on oath the applicant and any other witness, and shall satisfy himself of the existence of grounds for granting such application. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2524.*

§ 1822.54. [Issuance and contents of warrant]. If the judge is satisfied that the proper standard for issuance of the warrant has been met, he or she shall issue the warrant particularly describing each place, dwelling, structure, premises, or vehicle to be inspected and designating on the warrant the purpose and limitations of the inspection, including the limitations required by this title. Amended Stats 1984 ch 476 § 3. *Cal Jur 3d (Rev) Criminal Law §§ 2528, 2529.*

§ 1822.55. [Duration of warrant: Extension or renewal: Execution: Return.] An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2532.*

§ 1822.56. [Manner of inspection; Notice.] An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown. [1968 ch 1097 § 1; 1980 ch 230 § 2.] *Cal Jur 3d (Rev) Criminal Law §§ 2530, 2533.*

§ 1822.57. [Refusal to permit inspection.] Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor. [1968 ch 1097 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2519.*

§ 1822.58. [Inspections by personnel of Fish and Game Department.] A warrant may be issued under the requirements of this title to authorize personnel of the Department of Fish and Game to conduct inspections of locations where fish, amphibia, or aquatic plants are held

or stored under Division 12 (commencing with Section 15000) of the Fish and Game Code. [1982 ch 1486 § 1.] *Cal Jur 3d (Rev) Criminal Law § 2519.*

§ 1822.59. Inspections for purpose of animal or plant pest or disease eradication (a) Notwithstanding the provisions of Section 1822.54, for purposes of an animal or plant pest or disease eradication effort pursuant to Division 4 (commencing with Section 5001) or Division 5 (commencing with Section 9101) of the Food and Agricultural Code, the judge may issue a warrant under the requirements of this title describing a specified geographic area to be inspected by authorized personnel of the Department of Food and Agriculture.

(b) A warrant issued pursuant to this section may only authorize the inspection of the exterior of places, dwellings, structures, premises or vehicles, and only in areas urban in character. The warrant shall state the geographical area which it covers and the purpose of and limitations on the inspection.

(c) A warrant may be issued pursuant to this section whether or not the property owners in the area have refused to consent to the inspection. A peace officer may use reasonable force to enter a property to be inspected if so authorized by the warrant. Added Stats 1984 ch 476 § 4.

PART 3

Nuisance

TITLE

1. GENERAL PRINCIPLES. §§ 3479-3484.
2. PUBLIC NUISANCES. §§ 3490-3496.
3. PRIVATE NUISANCES. §§ 3501-3503.
4. MOTION PICTURES. §§ 3504-3508.2.

TITLE 1

General Principles

§ 3479. Nuisance, what.
§ 3480. Public nuisance.
§ 3481. Private nuisance.
§ 3482. What is not deemed a nuisance.
§ 3482.5. Commercial agricultural activities.
§ 3483. Successive owners.
§ 3484. Abatement does not preclude action.

Cal Jur 3d Nuisances §§ 1 et seq.; Cal Practice Ch 240 Model Action to Abate Nuisance and for Damages; Proceeding Under Red Light Abatement Law.

§ 3479. [Nuisance, what.] Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance. [1872; 1873-74 ch 612 § 284.] *Cal Jur 3d Alcoholic Beverages § 59, Health and Sanitation § 14, Highways and Streets § 74, Municipalities § 147, Nuisances §§ 5, 14-18; Cal Jur 3d (Rev) Criminal Law § 2056; Cal Practice §§ 240:1, 240:18; Witkin Crimes p 726; Witkin Procedure (3d) Actions § 174; Witkin Summary (8th ed) pp 2388, 2427, 2428, 5314, 5322, 5336.*

§ 3480. [Public nuisance.] A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [1872; 1873-74 ch 612 § 285.] *Cal Jur 3d Alcoholic Beverages § 59, Municipalities § 147, Nuisances § 24; Cal Jur 3d (Rev) Criminal Law § 1697; Cal Practice § 240:1; Witkin Procedure (3d) Prov Rem § 275; Witkin Summary (8th ed). p 5316.*

§ 3481. Private nuisance. Every nuisance not included in the definition of the last section is private. [1872.] *Cal Jur 3d Nuisances § 24; Cal Practice § 240:1; Witkin Summary (8th ed) p. 5316.*

§ 3482. What is not deemed a nuisance. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [1872.] *Cal Jur 3d Administrative Law § 96, Health and Sanitation § 14, Nuisances § 66; Witkin Summary (8th ed) p 5325.*

§ 3482.5. [Commercial agricultural activities] (a) No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changes condition in or about the locality, after the same has been in operation for more than three years if it was not a nuisance at the time it began.

(b) Subdivision (a) shall not apply, if the agricultural activity, operation, or facility, or appurtenances thereof obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public park, square, street, or highway.

(c) This section shall not invalidate any provision contained in the Health and Safety Code, Fish and Game Code, Food And Agricultural Code, or Division 7 (commencing with Secion 13000) of the Water Code, if the agricultural activity, operation, or facility, or appurtenances thereof, constitute a nuisance, public or private, as specifically defined or described in any such provision.

(d) This section shall prevail over any contrary provision of any ordinance or regulation of any political subdivision of the state.

(e) For purposes of this section, the term "agricultural activity, operation, or facility, or appurentances thereof" shall include, but not be limited to, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodity including timber, viticulture, apiculture, or horticulture, the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. [1981 ch 545 § 1.] Witkin Summary (8th ed) Equity § 105A.

§§ 3482.6, 3482.7. [Repealed, effective January 1, 1985, by their own terms.]

§ 3483. Successive owners. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it. [1872.] *Cal Jur 3d Nuisances § 34.*

§ 3484. Abatement does not preclude action. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [1872.] *Cal Jur 3d Nuisances § 59; Cal Practice § 240:5.*

TITLE 2

Public Nuisances

§ 3490. Lapse of time does not legalize.
§ 3491. Remedies against public nuisance.
§ 3492. Remedy regulated, how.
§ 3493. Remedies for public nuisance.
§ 3494. Action.
§ 3495. How abated.
§ 3496. Award of costs and fees to prevailing party.

Cal Jur 3d Nuisances §§ 5 et seq.; Cal Practice Ch 240 Model Action to Abate Nuisance and for Damages; Proceeding Under Red Light Abatement Law.

§ 3490. Lapse of time does not legalize. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. [1872.] *Cal Practice § 240:35; Witkin Procedure (3d) Actions § 348; Witkin Summary 8th ed) p 5316.*

§ 3491. [Remedies against public nuisance.] The remedies against a public nuisance are:

1. Indictment or information;

2. A civil action; or,

3. Abatement. [1872; 1880 ch 11 § 1.] *Cal Jur 3d Nuisances § 37, Statutes § 3; Cal Jur 3d (Rev) Criminal Law §§ 1696, 2727; Witkin Summary (8th ed) p 5324.*

§ 3492. [Remedy regulated, how.] The remedy by indictment or information is regulated by the Penal Code. [1872; 1880 ch 11 § 2.] *Cal Jur 3d (Rev) Criminal Law § 1693.*

§ 3493. Remedies for public nuisance. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise. [1872.] *Cal Jur 3d Nuisances § 26.*

§ 3494. Action. A public nuisance may be abated by any public body or officer authorized thereto by law. [1872.] *Cal Jur 3d Nuisances § 37.*

§ 3495. How abated. Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. [1872.] *Cal Jur 3d Nuisances § 37; Witkin Summary (8th ed) p 5324.*

§ 3496. [Award of costs and fees to prevailing party] In any of the following described cases, the court may award costs, including the costs of investigation and discovery, and reasonable attorneys' fees, which are not compensated for pursuant to some other provision of law, to the prevailing party:

(a) In any case in which a governmental agency seeks to enjoin the sale, distribution, or public exhibition, for commercial consideration, of obscene matter, as defined in Section 311 of the Penal Code.

(b) In any case in which a governmental agency seeks to enjoin the use of a building or place for the purpose of illegal gambling, lewdness, assignation, or prostitution; or any case in which a governmental agency seeks to enjoin acts of illegal gambling, lewdness, assignation, or prostitution in or upon a building or place, as authorized in Article 2 (commencing with Section 11225) of Chapter 3 of Title 1 of Part 4 of the Penal Code.

(c) In any case in which a governmental agency seeks to enjoin the use of a building or place, or seeks to enjoin in or upon any building or place the unlawful sale, manufacture, service, storage, or keeping or giving away of any controlled substance, as authorized in Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code.

(d) In any case in which a governmental agency seeks to enjoin the unlawful sale, service, storage, or keeping or

giving away of alcoholic liquor, as authorized in Article 1 (commencing with Section 11200) of Chapter 3 of Title 1 of Part 4 of the Penal Code. Amended Stats 1987 ch 1076 § 1. *Witkin Procedure (3d) Judgm § 159.*

(2)

89-1875

Supreme Court, U.S.
FILED
JUN 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

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Petitioners,

vs.

DALE CONNER AND LINDA CONNER,

Respondents.

BRIEF OF CALIFORNIA CITIES AMICUS CURIAE ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Adams, Duque & Hazeltine
Richard R. Terzian
523 West Sixth Street
Los Angeles, California
(213) 620-1240

Counsel for Amicus Curiae

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Counsel for Amicus Curiae

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The California cities of Alameda, Arcadia, Burlingame, Coachella, Culver City, El Cajon, Gardena, Glendale, Indio, Merced, Monterey, Palm Desert, Placentia, Pleasant

Hill, Rolling Hills Estates, San Francisco, San Jose, Santa Maria, South Lake Tahoe, South San Francisco, Turlock, Tustin, and Vacaville ("Cities"), as authorized by their respective law officers set forth on the Appendix hereto, support as amicus curiae the petitioners City of Santa Ana, et al. for issuance of a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit entered in the above-entitled case, reported at 897 F.2d 1487 and attached as Appendix A to the Petition.

I.

INTEREST OF THE CITIES

Cities are located throughout California and differ from each other in numerous respects. They all, however, share the same problem as petitioner City of Santa Ana: the necessity to abate nuisances which impinge upon the health, safety and welfare of their residents. These concerns are not limited to inoperable vehicles, but also deal

with a variety of conditions involving excessive noise, offensive odors, fire hazards, unsafe buildings and traffic obstruction which may all be abated under procedures similar to that rejected by the Ninth Circuit in this case. The ability of Cities to protect the public health, safety and welfare will be severely impaired if the judgment below stands.

II.

SUMMARY OF ARGUMENT

The decision below exalts form over substance by a mechanical application of rules without adequate analysis of the competing interests to be served.

Under the opinion, it is Constitutionally acceptable for a non-judicial forum to determine that a citizen may be deprived of property but implementation of that decision requires the pro forma intervention of a court. This bizarre result ignores the rationale for Constitutional protection against search and seizure.

Cities submit that adequate procedural due process relating to abatement of a nuisance in advance of entry on private property is the functional equivalent of a warrant.

III.

ARGUMENT

A warrantless entry was made onto the property of respondents on July 1, 1983 for the purpose of inspection to ascertain whether vehicles in their open yard were inoperable and subject to abatement. There is no dispute that this initial entry required a warrant.

Similarly, there is no dispute that the respondents were thereafter accorded Constitutionally adequate due process in connection with determination of whether they were maintaining a nuisance on their property and whether it should be abated (Petition, Appendix A, pp. 12a-13a). The issue before this Court is whether that due process was adequate to serve as the functional

equivalent of a warrant to allow entry onto the property after the substantive determination had been made that a nuisance existed and was subject to abatement.

California has determined that the presence of inoperable (i.e., "junk") vehicles open to public view on private property is offensive and deleterious to the public interest. The state has expressed this determination in the adoption of California Vehicle Code Sections 22660-22664 which delegate authority to the municipalities of the state to adopt ordinances for alleviating the problem, pursuant to explicit and carefully-defined statutory guidelines.

Santa Ana implemented this authorization by adoption of its Municipal Code Sections 16-113 through 16-121. (Petition, Appendix B, pp. 6b-7b). The ordinance provides for notice and opportunity to be heard by the owner of land from which a vehicle is to be removed. Just as there is no dispute that this ordinance afforded

Constitutionally adequate due process to respondents, there is similarly no dispute that it was a proper delegation of authority by the state to the city. (Petition, Appendix A, pp. 13a-14a).

Respondents went through hearings at two separate administrative levels over a period of months. After the administrative proceedings ended and the Santa Ana City Council had determined the issue against them, respondents failed to avail themselves of their right to seek relief in the state courts. (Petition, Appendix B, pp. 4b-5b).

Shortly thereafter, the city implemented its determination that a nuisance existed on respondents' property by entering upon the property and removing the vehicles, (i.e., abating the nuisance). Although there was no warrant for this action from a court, respondents had been aware for the previous six months that the vehicles were the object of possible removal from their same location

outdoors at which they had initially been discovered.

The Ninth Circuit held that no judicial involvement was necessary in the determination that the vehicles were a nuisance subject to abatement (Petition, Appendix A, p. 13a). However, the Ninth Circuit also held that even after this substantive determination had been made in a non-judicial forum the Fourth Amendment required imposition of another step: review by a judicial officer before entry could be made on to property for the abatement to occur. (Petition, Appendix A, p. 11a).

The Ninth Circuit primarily relied on four cases to reach this result: Camara v. Municipal Court, 387 U.S. 523 (1967); Michigan v. Tyler, 436 U.S. 499 (1978); G.M. Leasing v. United States, 429 U.S. 338 (1977); and Gleaves v. Waters, 175 Cal.App.3d 413, 20 Cal.Rptr. 623 (1985). As will be demonstrated below, the Ninth Circuit's analysis of these cases was flawed because it

telescoped the conceptually-distinct events of inspection and abatement. This Court should now decide whether an abatement following hearings affording procedural due process must be treated the same as an initial inspection to ascertain the existence of a nuisance. There is no case precisely on point and it is one of first impression before this Court.

The requirement that a warrant must be obtained for a civil health and safety inspection was first enunciated by this court in Camara which involved a warrantless inspection made as part of an ongoing city policy to determine compliance with the local building code. The purpose was "annual inspection for possible violations" of San Francisco's building code (Camara, p. 526), and discovery of such violations could lead to criminal prosecution. This Court held that:

> ". . . administrative searches of the kind at issue here are

> significant intrusions upon the interests protected by the Fourth Amendment . . ."

(Camara at p. 534, emphasis added.)

After imposing a Fourth Amendment warrant requirement on initial inspections, this Court thereafter balanced the need for Constitutional safeguards against the community need to correct unsightly conditions that could "adversely affect the economic values of neighboring structures" (Camara, p. 535). In achieving this balance, this Court rejected the requirement of "probable cause" to inspect a particular structure in the context of criminal investigations for a broad area-wide inspection pursuant to reasonable statutory standards. This Court did not make a mechanical application of the reasonableness standards of the Fourth Amendment by placing the competing needs of an individual's privacy expectations against the needs of that individual's neighbors and the public in general for a safe and

healthful community. Rather, this Court broadened the Fourth Amendment requirement of reasonableness to meet the particular public needs involved based on the following rationale:

> "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant [citations]. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely <u>gives full recognition to the competing public and private interests here at stake</u>

> and, in so doing, best fulfills the historic purpose behind the Constitutional purpose to be free from unreasonable government invasions of privacy."

(Camara at p. 539, emphasis added).

In Michigan v. Tyler, 436 U.S. 499 (1978), certain objects were discovered at the site of a fire by firefighters shortly after the fire was extinguished. Some time later, subsequent entry was made to the site for the gathering of additional objects, all of which were subsequently used in an arson prosecution of the property owner. This Court required a warrant for the subsequent entry and reaffirmed its holding in Camara extending Fourth Amendment protection beyond criminal law enforcement "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" to inspectors whose:

> ". . . purpose may be to locate and abate a suspected public nuisance

or simply to perform a routine, periodic inspection."

(Michigan at p. 504, emphasis added).

Just as in Camara, the restriction was on the initial intrusion intended for discovery, even though the language of the opinion combines the two separate actions of location and abatement. The Ninth Circuit erroneously telescoped these two concepts into one without examination of the differing interests affected. (Petition, Appendix A, p. 8a). The Ninth Circuit also erroneously relied on a California decision, Gleaves v. Waters, 175 Cal.App.3d 413, 220 Cal.Rptr. 621 (1985) in which the two acts of inspection and abatement had in fact been combined.

In Gleaves, a county had been declared infested with insects dangerous to crops. Pesticide was applied by state inspectors to trees in open enclosed yards without a warrant. Although California law specifically provided for inspection warrants under California Code of Civil Procedure

Sections 1822.50-1822.59, there was no statutory requirement for an abatement warrant. The inspection to determine the presence of the insect and immediate application of the pesticide for abatement upon such discovery were carried out simultaneously. Under such circumstances, a warrant was required.

This Court has not decided any case nor has any other case been discovered, in which the abatement occurred after a full-scale hearing affording Constitutionally-adequate due process. The Ninth Circuit appeared to rely on G.M. Leasing v. United States, supra, for this purpose but it is readily distinguishable. In G.M. Leasing, a tax deficiency had been assessed against a taxpayer but no hearings had been held. IRS agents seized automobiles parked in public places without warrants and also entered a cottage from which material was removed. This Court permitted the warrantless seizure of the vehicles but required a warrant for

the contents of the cottage, once more relying upon Camara. As in Camara, one of the issues was concern with uncontrolled discretion of the officers seizing property which could only be appropriately guided by application of Fourth Amendment protections (G.M. Leasing at p. 357).

Application of the Fourth Amendment to administrative searches is founded on reasonable privacy expectations of individual citizens to limit the uncontrolled discretion of public officers. The only way to accommodate that need was to impose a Fourth Amendment requirement of a warrant on the initial inspection as occurred in Camara. The same requirement existed when the inspection and abatement process were combined into one as existed in Gleaves. Here, however, the abatement followed the initial inspection by some two years, in which intervening time, respondents had notice of the city's intention to remove the vehicles. Thus, the notice requirement of

procedural due process was satisfied. This was the only due process, in the form of a tax assessment notice, that existed in G.M. Leasing.

Thereafter, hearings were held at two administrative levels, first before a city official not actually inspecting the premises and the second before the entire City Council. The Ninth Circuit necessarily found all the elements of procedural due process in addition to notice were fully satisfied. The subject vehicles were in the same place at the end of this process. It was hardly a surprise or an intrusion upon a reasonable expectation of privacy when the city officials actually entered the respondent's yard to carry out the decision that had been communicated to them some months before. The discretion of the city officials was carefully focused and well-controlled. They were only to remove the specific vehicles that had been the subject matter of the hearing and no others. Thus,

the entire rationale for imposition of Fourth Amendment protections in this context had been fully satisfied because the City Council, in conducting its hearing, had served the functional equivalent of a warrant.

The Ninth Circuit, however, apparently believes that a search can be "reasonable" only if it is pursuant to a warrant issued by a "judicial officer" with certain emergency-type exceptions inapplicable here. (Petition, Appendix A, pp. 9a-9b). This Court has held that no such requirement exists. In Shadwick v. City of Tampa, 407 U.S. 345 (1972), the Clerk of the Municipal Court in Tampa, Florida could issue warrants for the arrest of individuals violating local ordinances. This Court rejected the notion that warrants had to be issued by a judge or a lawyer. Rather, this Court stated:

> "The warrant traditionally has represented an independent

assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search . . . .. Whatever else neutrality and detachment entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would

distort the independent judgment the Fourth Amendment requires."

(Shadwick at p. 350)

Although the fact that the clerk was associated with the judiciary was of significance to this Court, the opinion concluded:

"What we do reject today is any per se invalidation of a state or local warrant system on the ground that the issuing magistrate is not a lawyer or judge. Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges or lawyers. . . . All this is not to imply that a judge or lawyer would normally provide the most desirable review of warrant requests. But our federal system warns of converting desirable practices into Constitutional commandment. It recognizes in

> plural and diverse state activities one key to national innovation and vitality."

(Shadwick at pp. 352-353, emphasis added).

Shadwick recognized the need for local discretion in dealing with the issue of warrant requirements as did Camara in accommodating the different issues involved in civil inspection as compared to criminal investigation. That same flexibility should be applied here to substitute the hearing before the City Council as the functional equivalent to the hearing on a warrant, since virtually all the criteria of Shadwick are satisfied. The City Council members do not lead the investigation nor are they the officers actually inspecting the premises or abating the nuisance thereon. The decision reached is narrowly focused on specific items and the discretion of the officers removing these items is thus controlled. The Santa Ana City Council here was as "neutral and detached" from enforcement as was the Clerk

of the Tampa Municipal Court. The privacy expectations of respondents were non-existent after two years of administrative litigation concerning the particular vehicles. The same policy reasons for a broader and more flexible interpretation of "reasonableness" in light of the public interest exist as were enunciated in Camara.

In short, the requirements of the Fourth Amendment, as authoritatively determined by this Court, are fully satisfied by the procedures used in the narrow circumstances of abatement after administrative hearings as occurred in this case. To allow the judgment below to stand would do far more than exalt form over substance of Constitutional requirements without consideration of their intention. The judgment would also impose a substantial burden on Cities in carrying out their vital local functions. Nuisance abatement proceedings similar to those that occur here are applicable not only to inoperable vehicles but also

to unsafe building conditions, unhealthy food preparation, fire hazards, weeds, trash, blockage of public rights of way and numerous other conditions that impact significantly on the health, safety and welfare of millions of Californians.

As pointed out in Gleaves v. Waters, (p. 420), California has no statutory procedure for obtaining a warrant for abatement. Such warrants are limited to the initial inspection. The only other warrant system is in connection with a criminal investigation (California Penal Code Sections 1523-1542).

Imposing a warrant requirement for abatement after hearings would place a significant burden on Cities as well as an already-overburdened state judiciary for no substantial purpose or rational end.

IV.

CONCLUSION

For the reasons set forth above, Cities pray that this Court issue its writ of

certiorari so that the issues described herein and in the City of Santa Ana's petition may be fully reviewed and determined for the guidance of all concerned.

Dated: June 27, 1990

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
Richard R. Terzian
Counsel for Cities

APPENDIX

LAW OFFICERS OF CITIES SUBMITTING BRIEF AMICUS CURIAE

1. Alameda -- Carol A. Korade, City Attorney
2. Arcadia -- Michael H. Miller, City Attorney
3. Burlingame -- Jerome F. Coleman, City Attorney
4. Coachella -- David J. Irwin, City Attorney
5. Culver City -- Eleanor M. Eagan, City Attorney
6. El Cajon -- Lynn R. McDougal, City Attorney
7. Gardena -- Michael J. Karger, City Attorney
8. Glendale -- Scott H. Howard, City Attorney
9. Indio -- David J. Irwin, City Attorney
10. Merced -- Steven F. Nord, City Attorney

11. Monterey -- William B. Conners, City Attorney
12. Palm Desert -- David J. Irwin, City Attorney
13. Placentia -- Carol B. Tanenbaum, City Attorney
14. Pleasant Hill -- David Larsen, City Attorney
15. Rolling Hills Estates -- Richard R. Terzian, City Attorney
16. San Francisco -- Louise H. Renne, City Attorney and Burk E. Delventhal, Deputy City Attorney
17. San Jose -- Joan R. Gallo, City Attorney
18. Santa Maria -- Arther R. Montandon, City Attorney
19. South San Francisco -- Valerie J. Armento, City Attorney
20. South Lake Tahoe -- J. Dennis Crabb, City Attorney
21. Turlock -- Angil P. Morris, City Attorney
22. Tustin -- James G. Rourke, City Attorney

23. Vacaville -- Charles O. Lamoree, City Attorney

Supreme Court, U.S.
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JUN 28 1990
JOSEPH F. SPANIOL, JR.
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No. 89-1875

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CITY OF SANTA ANA, et al.,
Petitioners,

vs.

DALE CONNER and LINDA CONNER,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE COUNTY OF LOS ANGELES IN SUPPORT OF PETITIONERS, CITY OF SANTA ANA, ET AL.

DE WITT W. CLINTON
County Counsel

PAUL T. HANSON
Principal Deputy County Counsel
(Counsel of Record Pursuant to Rules of the U. S. Supreme Court, Rule 33(2)(7))

648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1841

Attorneys for Amicus Curiae
COUNTY OF LOS ANGELES

Summary of Reasons to Grant Petition:

1. The right of local communities to abate public nuisances on private property, after notice, hearing, finding, and order of correction or abatement, without any judicial branch involvement, including a warrant requirement, is old and established.

2. The warrant requirement in the 4th Amendment has never been applied to entry to abate a known public nuisance after notice, hearing, finding, and order.

3. Local government programs to cite public nuisances on the complaints of neighbors, and abate after hearing, protect neighborhoods from creeping blight and "keep the

peace" between neighbors by providing a practical, inexpensive remedy for this problem.

4. A warrant requirement will delay the correction of public nuisances, increase neighborhood blight, and threaten the peace of neighborhoods suffering from a selfish property owner.

5. Since the selfish property owner has already had notice, a hearing, a finding of nuisance, and an order of correction or abatement which he could take to the judicial branch by administrative mandate or petition for injunction, he has no legitimate interest which the warrant is necessary to protect.

6. Since there has never been such a

requirement, it is cruel to deny qualified immunity to public employees for entry of private property to abate after hearings, etc., without warrants of a type which did not exist statutorily, then or now.

Questions Presented:

Should a warrant requirement now be imposed on local government to enter private property to abate public nuisance, after notice, hearing, finding of public nuisance, and a reasonable time for the property owner to correct the public nuisance or seek judicial relief?

Should local public officials who entered private property to abate a public nuisance, after notice, hearing, etc., prior to the decision in this case, not have qualified immunity since the warrant requirement after notice, hearing, etc., did not exist before this decision?

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rules, Rule 37.5, the County Counsel of Los Angeles County, State of California,

submits this brief in support of Petitioners, the City of Santa Ana, et al., only as to the issues of warrants for abatement after notice and hearing and qualified immunity as described on Page iv, supra.

County strongly agrees with the dissenting opinion of Judge Trott in this case.

Nothing in this brief is intended to refer in any way to an emergency situation, in which public building officials may abate a public nuisance which is an immediate and serious threat to public health and safety by demolition or otherwise without notice and a hearing.

1. The Warrant Requirement

A nuisance is a condition of property which is injurious to health, which is offensive to the senses, or which interferes with the use or enjoyment of neighbors' property. (Calif. Civil Code, §3479 (enacted 1872, based on Field Codes).)

Nuisance is well-defined by modern case law and the common law.

A public nuisance is one which affects at the same time an entire community or neighborhood or considerable number of persons. (Calif. Civil Code, §3480.)

Under California law (and generally) local governments such as

counties may abate public nuisances, after notice and hearing, with no judicial branch involvement. (Calif. Civil Code, §3491(3); Calif. Govt. Code, §25845; 58 Am Jur. 2d, Nuisances, §411, p. 989 (1989).)

Heretofore this Court has not required a warrant under the Fourth Amendment when local officials enter to abate after notice, hearing, finding of nuisance, and order.

Los Angeles County regularly abates public nuisances after notice and hearing in its unincorporated areas and, by contract, for 20 cities within the County.

This County program attacks neighborhood deterioration from unsightly,

unsafe, and unhealthful property conditions.

Typical abatements (after notice and hearing) include: barricading or demolition of abandoned, dangerous structures; clearance of debris, inoperable vehicles, and overgrown vegetation from land.

In 1989, this program in County resulted in: 462 houses being restored for occupancy; 1,114 properties being cleared of trash, debris, excessive weeds and brush, and inoperable machinery and vehicles; and 117 deteriorated structure being demolished in areas of extensive blight.

This program also "keeps the peace" in neighborhoods by providing

small property owners with an inexpensive, practical (i.e., non-judicial) remedy against the selfish neighbor, who for whatever reason, keeps his property in a seriously blighted and/or dangerous condition.

70% of County's rehabilitation enforcement actions arise from neighbor complaints. (See e.g., Petitioners' Brief, Appendix B, Page 3b, Court Findings 15 and 16.)

The County's procedures, by ordinance, require:

1. That an inspector investigate the neighbor's complaint of a public nuisance by express permission or by obtaining a judicial inspection warrant if permission to enter cannot be obtained. (See Calif. Code Civ.

Proc., §1822.50.)

2. That if the inspector finds a public nuisance, a written notice of the finding be given to the owner.

3. That a hearing be held before the Rehabilitation Appeals Board (a politically-appointed body of persons knowledgeable in real estate and property management matters) and the owner be allowed to present his case in opposition to the inspector.

4. That, if the Board finds a public nuisance, a written finding and order, giving the owner a reasonable time and a reasonable manner to abate the nuisance or the entity will abate it, be sent to the owner. (Typical order: 90 days to remove

excessive weeds or trash or it will be removed by County.)

5. If the corrective work is not done and an extension of time is not requested and granted by the Board, the work will be done by County forces.

In the past, although an inspection warrant was necessary if permission to enter was not obtainable, no warrant for abatement of a known public nuisance has ever been requested by County from the judicial branch or demanded by a property owner. (Although there is an inspection warrant, no abatement warrant seems to exist in California or elsewhere. See below.)

If this Court imposes a warrant

requirement, it will increase neighborhood blight, especially in older, poorer neighborhoods, and increase breaches of the peace involving selfish neighbors by substantially impeding the abatement of known public nuisances by local government.

Since there is no such warrant in California, such a ruling would destroy this socially beneficial County program.

2. Qualifed Immunity

Since there has never been a requirement for a warrant to enter land to abate a known public nuisance after notice, hearing, etc., and since there was no such warrant in California at the pertinent time (see

below), it was unfair and callous of the majority to remove qualified immunity from the public officials, employees, and agents who entered to abate the public nuisance after notice, adversary hearings, findings and rulings of public nuisance, and more than ample time for the property owner to correct the situation.

As to the entry to inspect, an inspection warrant existed in California and would have been obtained under County procedures. But, City's ordinance did not so require, so they should be immune.

And by stripping qualified immunity from these innocent officers who entered without a warrant to abate after hearings, etc., when there was

not even a warrant available for that kind of entry, the Ninth Circuit has done a serious injustice to these innocent public employees.

ARGUMENT

1. Municipalities' Police Power to Abate Public Nuisances After Notice and Hearing, Without Judicial Process, Is Well Established.

It is well settled that the police power of municipalities in this country includes the power to abate public nuisances, after notice and hearing (if not an emergency), with no judicial process. (City of Rapid City v. Boland (Supreme Court

of South Dakota, 1978) 271 N.W. 2d 60, 67; Thain v. City of Palo Alto (1962) 207 Cal. App. 2d 173, 187-91, 24 Cal. Rptr. 515, 523-26; 58 Am. Jur. 2d, Nuisances, §411, p. 989 (1989); 6A McQuillin, Municipal Corporations, §§24.71 and 24.72, pp. 208-212; Restatement, Second, Torts §202, pp. 375-78 (A.L.I., 1965); Restatement, (First) Torts §202, (A.L.I., 1934-39).)

This Court itself has agreed, stating about the local police power, "It is universally conceded . . . to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." (Lawton v. Steele (1894) 152 U.S. 133, 136, 38 L.Ed. 385, 388,

14 S.Ct. 499, 500.)

2. Judicial Warrants Have Never Been Required for Entry to Abate After Notice and Hearing (If Non-Emergency)

In no reported federal or state case has this power been limited by the requirement of a judicial warrant to enter to abate, after notice and hearing and finding of public nuisance, except the case at bar.

Those cases relied on by the majority which pertained at all to local power to abate public nuisances were only about the necessity of a

warrant for inspection, not for abatement after hearing.

In Gleaves v. Waters (1985), 175 Cal. App. 3d 413, 220 Cal. Rptr. 621, the California Court of Appeal ruled that when permission to enter is refused to both inspect and abate, if necessary (by leaving posion for Japanese beetles), during the same entry, a warrant is required for that entry.

County agrees with this limited ruling on the actual facts but not with possible dicta therein. If entry is refused to inspect or inspect and abate at the same time (in a non-emergency situation), a warrant should be obtained because the inspector is clearly searching

for possible public nuisance, under the Fourth Amendment.

However, in the case at bar as in the typical case, the entry for abatement occurred after notice and lengthy hearings, after a finding of public nuisance by an authorized representative of the lcoal governmental entity, and after time for the owner to either correct the nuisance or take the matter to court by injunction or administrative mandate or petition for declaratory relief.

And therefore, no warrant should be required for the entry to abate.

If warrants for entry for abatement after notice and hearing were legally required, they would surely exist in federal and state statutes

and in the form books since local government non-judicial abatement of public nuisances is an ancient right, oft-used from common law to the present

There is no such warrant in California. As the Gleaves court noted, "Indeed, we are unaware of any statutory procedure for issuance of a warrant authorizing entry into private property specifically to abate a public nuisance." (Gleaves v. Waters, supra, 175 Cal. App. 3d at 420, 220 Cal Rptr. at 625.)

A review of the popular form books, federal and state, reveals no form for a warrant specifically to enter to abate a public nuisance.

The two pertinent model building

codes are consistent. Both require a judicial warrant to enter to inspect for public nuisance if entry is refused but neither requires a warrant to enter to abate a nuisance found after notice and hearing. (See Uniform Housing Code, §201(b) (International Conference of Building Officials, 1985 Edition); see Uniform Code for the Abatement of Dangerous Buildings, §201(c) (International Conference of Building Officials, 1985 Edition).)

Local governments have used this power frequently for, say, 250 years; and yet there are no forms for such warrants. This persuades that there has never been a warrant requirement before this case.

3. A Warrant Would Add Nothing to Owner's Protection.

The Fourth Amendment requires that a warrant be based on probable cause and that the place to be entered and the objects to be sought be particularly described.

In the case at bar, and in all local abatement proceedings, because of the due process requirements of adequate notice, fair hearing, and specific order, the property on which the nuisance is located (lot number, street address) and the nuisance itself (dilapidated structure, excessive weeds, old cars, etc.) and the steps to be taken by owner or

entity to correct or abate it in a specific time (repair, barricade, remove, fence, demolish, etc.) are perfectly clear.

It is not probable but certain that the nuisance has been declared and it is certain that the nuisance exists on the property and of what it consists.

The only dispute is usually whether the situation constitutes a public nuisance or whether the abatement method ordered is too drastic or the time allowed for correction is too short.

But a judge only issuing a warrant would not have authority to get to the merits of these disputes.

After a hearing, a warrant

requirement only adds paperwork and delay. After the hearing, there is nothing for the warrant-issuing judge to decide which is really in dispute.

4. Since No Warrant Was Required for Abatement Entry, Officers Should Have Qualified Immunity.

It is very clear (supra) that the law clearly did not require a warrant for the entry to abate.

The First and Second Restatement of Torts describe such an entry of private property by a public official as "privileged." (Supra, as to Second Restatement; First Restatement

was issued in 1934-39 and is now hard to find, but see Vol.1 Restatement of the Law of Torts, California Annotations, §202 (A.L.I., 1940).)

It is grossly unfair to remove qualified immunity from the officers who entered to abate after the extensive hearings and ample time for the owners to correct the problem.

CONCLUSION

It is clear that the Ninth Circuit wants more than a mere warrant requirement. The majority clearly want to require judicial action to abate all public nuisances. (See Conner v. Santa Ana (9th Cir. 1990) 897 F.2d 1487, 1492 at note 7.)

This will unnecessarily remove a traditional police power from local government and will increase the load of the courts.

The result will be increased neighborhood blight and increased breaches of the peace involving selfish neighbors.

This Court should follow Justice Trott's dissenting opinion and not require a warrant after notice and hearing and should restore qualified

immunity to the officers who entered to abate.

Wherefore this Petition should be granted and the dissenting opinion of Judge Trott should be adopted by this Court.

Dated June 28, 1990

DE WITT W. CLINTON
County Counsel

PAUL T. HANSON
Principal Deputy
County Counsel

Attorneys for
Amicus Curae
COUNTY OF
LOS ANGELES

5/BRIEF-1/am
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